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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-251

Garland M. Fitzpatrick, et al.,
Donald Matthews, et al., *Plaintiffs Petitioners*

v.

Frederick Bitzer, Chairman, et al.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners, Donald Matthews, et al., respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on June 2, 1975.

Opinions Below

The opinion of the Court of Appeals of June 2, 1975 is not yet reported, and is set out in the Appendix hereto, pp. 1a-24a. The opinion of the District Court of September 16, 1974 is reported in 390 F. Supp. 278 (D. Conn. 1974), and is incorporated by reference to the appendix of respondent Bitzer (hereafter referred to as the State of Connecticut) in its Petition for Writ of Certiorari (to be) filed in this Court.

Jurisdiction

The judgment of the Court of Appeals was entered on June 2, 1975. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Question Presented

Does the Eleventh Amendment prohibit a federal court from awarding backpay monetary relief against a state, in favor of employees of that state who established that they were victims of discriminatory state laws which violated Title VII of the 1964 Civil Rights Act as amended in 1972?

Constitutional and Statutory Provisions Involved

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Title VII of the Civil Rights Act of 1964, with 1972 amendments made by the Equal Employment Opportunity Act of 1972 (in italics), 42 U.S.C. §2000e, provides in pertinent part:

> For the purposes of this subchapter–
>
> (a) The term "person" includes one or more individuals, *governments, governmental agencies, political subdivisions,* labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.
>
> (b) The term "employer" means a person engaged in an industry affecting commerce who has *fifteen* or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or *any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5),* or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, *except that during the first year after March 24, 1972,* persons having fewer than *twenty-five* employees (and their agents) shall not be considered *employers.*
>
> . . .
>
> (f) The term "employee" means an individual employed by an employer, *except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the*

constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.

42 U.S.C. §2000e-2

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees *or applicants for employment* in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

. . .

42 U.S.C. §2000e-5

. . .

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable *to secure from the respondent a conciliation agreement acceptable to the Commission,* the Commission *may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been*

unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security.

Upon timely application, the court may, in its discretion, permit *the Commission, or* the Attorney General *in a case involving a government, governmental agency, or political subdivision,* to intervene in such civil action *upon certification* that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections *(c) or (d) of this section or further* efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the *basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.*

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the

employment records relevant to such practice are maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). *or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission.* Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

Statement of the Case

This suit was brought as a class action on behalf of all present and retired male employees to enjoin as violative of the 14th Amendment and the Civil Rights Act of 1871 the sexually discriminatory provisions of the Connecticut State Employees Retirement Act. After a three-judge court was convened, the complaint was amended to allege that the Retirement Act violated Title VII of the Civil Rights Act of 1964 as amended in March 1972 to include states, and so the court remanded the case to the single district judge who convened it, to consider the applicability of federal statutory law. Jurisdiction of this suit existed under 28 U.S.C. §§1331, 1343(3) and (4), 2201, 2202, 2281 and 42 U.S.C. §2000e-5(f)(3). On mainly stipulated facts, the District Court found that the Retirement Act essentially granted to women employees having 25 or more years of service the right to retire five years earlier than similarly situated men and further that there were rate benefit differentials in favor of female over male employees with less than 25 years of state service. It held that this constituted an unlawful employment practice by Connecticut because it discriminated between men and women in regard to fringe benefits and consequently violated Title VII and regulations thereunder. The District Court granted plaintiffs prospective injunctive relief and ordered defendant state officials and their successors to administer the Act without unreasonable sex classifications unfavorable to men.

Plaintiffs, however, also sought monetary damages in the form of recalculated benefits for retired males retroactive to various points in time, the earliest in 1965, as necessary to give them complete relief. They further sought an allowance for reasonable fees for their attorneys, and the District Court found fees totaling $6,275 were fair and reasonable. The District Court held that monetary and attorneys' fees awards against the state were precluded by the Eleventh Amendment and *Edelman v. Jordan, infra,* since any recovery would come from the public treasury.

Two retired male plaintiffs (the petitioners here) who had been receiving lower benefits than comparable females appealed the decision of the District Court to the United States Court of Appeals for the Second Circuit. The State of Connecticut did not cross-appeal the basic decision striking down the sexually discriminatory provisions of its retirement laws. The Court of Appeals affirmed the District Court's refusal to award back pay, but reversed on the question of attorneys' fees. (App. 6a) It held that the Eleventh Amendment and this Court's decision in *Edelman v. Jordan* precluded an award of back pay by a federal court against a state, even though it said that Congress had intended to make that remedy available against the states under the Equal Employment Opportunity Act of 1972. (App. 15a-17a, 20a) It also held, however, that an award of attorneys' fees to the successful plaintiffs was not barred by the Eleventh Amendment, a holding the State of Connecticut is seeking to have reviewed by this Court.

The constitutionality of portions of an Act of Congress affecting the public interest have been drawn into question – and effectively nullified – by the decisions of both federal courts. Thus 28 U.S.C. §2403 is applicable. The Equal Employment Opportunity Commission filed in the Second Circuit a brief as *amicus curiae* supporting petitioners' position on the question here presented.

Reasons for Granting the Writ

1. *Importance of Question:* This case raises in a setting devoid of factual dispute an important question of federal law which has not been, but should be, settled by this Court. Although the Second Circuit found that Congress intended to authorize a private suit for backpay by state employees against the state, it held that the Eleventh Amendment precluded such a monetary award in a federal court. The 1972 amendments to Title VII of the 1964 Civil Rights Act were intended to cover employees of state and local governments from employment discrimination as fully

as if they were employees of private industry; but the provision authorizing backpay to state employees has been held unconstitutional. This holding portends a devastating effect on the enforcement of Title VII as applied to such employees. Since this case also involves the tension, indeed conflict, between the Eleventh and Fourteenth Amendments, it is of the greatest public importance.

The State of Connecticut did not appeal the District Court's finding that its own retirement laws discriminated against active and retired male employees. The Second Circuit necessarily said that,

> "It is evident that the 1972 amendments to Title VII...did contemplate private actions against state governments or their agencies... Thus,...Congress intended to authorize a private suit for backpay by state employees against the state." (App. 15a, 17a)

Nevertheless, relying on the Eleventh Amendment and *Edelman v. Jordan,* 415 U.S. 651, *reh. den.* 416 U.S. 1000 (1974), that court held that Congress could not authorize private damage suits for enforcing Fourteenth Amendment rights. The court so decided even though, aside from clear language and intent, Congress satisfied those tests used to determine whether it has exercised its authority under the enabling clause, section 5, of the Fourteenth Amendment: (1) the legislation is a measure to secure rights protected by the Fourteenth Amendment; (2) it is plainly adapted to that end, and (3) it is consistent with the letter and spirit of the Constitution. *Katzenbach v. Morgan,* 384 U.S. 641, 651 (1966).

If the Second Circuit's decision becomes precedent, the thousands of the hundreds of thousands of state employees who have been or will be victims of employment discrimination will not be "made whole" and will not be put on a par with their counterparts in private industry as Congress intended they should be. (App. pp. 15-17a and

citations[1]) The Connecticut State Employees Association, a sponsor of this lawsuit, is representative of the many governmental employees' unions aghast at this result. The Equal Employment Opportunities Commission filed an *amicus* brief below supporting petitioners and is gravely concerned at the consequences of this holding on its nationwide compliance and enforcement efforts as they affect governmental bodies under Title VII. The NAACP Legal Defense and Educational Fund, Inc. which filed an *amicus* brief in *Edelman v. Jordan* and a petition for certiorari in *Jordan v. Gilligan,* 500 F.2d 701 (6th Cir. 1974); No. 74-403 U.S. S. Ct., sees a manifestly deleterious effect on efforts to end employment and other discrimination.

The significance of the question, and the contrast between remedies available to the employees of private industry and of state governments, is highlighted by this Court's recent decision showing the importance of back pay to the purpose of Title VII. *Albemarle Paper Co. v. Moody,* — U.S. —; 95 S. Ct. 2362, esp. 2371-73 (1975).

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1 The Second Circuit might further have cited the highly pertinent portion of the legislative history of the 1972 Amendments quoted in petitioners' brief:

> "The last sentence of the Fourteenth Amendment, enabling Congress to enforce the Amendment guarantees by appropriate legislation is frequently overlooked and the plain meaning of the Constitution allowed to lapse. The inclusion of state and local government employees within the jurisdiction of Title VII guarantees and protections will fulfill the Congressional duty to enact the 'appropriate legislation' to insure that all citizens are treated equally in this country." Senate Rep. No. 92-415 (92 Cong., 1st. Sess. 1971); *Legislative History of the Equal Employment Opportunity Act of 1972* at 419-420.

Furthermore, the comments of Senator Williams, sponsor of the amendments, emphasizes the intent to give the most complete relief possible to aggrieved persons. *Id.* at 1848; 118 Cong. Rec. 7168 (1972).

The question presented, and similar questions, are arising with increasing frequency in the courts, and overbroad readings of *Edelman* are being used to attack and errode an important federal law enacted under Section 5 of the Fourteenth Amendment. A similar question was presented but not reached in *Vick v. Texas Employment Commission,* — F.2d — (5th Cir. 1975); 10 FEP Cases 1092. Because the remedies available under Title VII include both counsel fees and back pay, the states of Florida, Mississippi, Maryland and Illinois have apparently contended that Title VII is, in this respect, unconstitutional.[2] The power of Congress to authorize federal courts to enforce the Fourteenth Amendment is a constitutional question of the first magnitude which only this Court can definitively decide, and a prompt resolution is necessary lest uncertainty as to the availability of a remedy delay the commencement or prosecution of private civil litigation to enforce Title VII prohibitions against state discrimination.

2. *Important Underlying Federal Question:* There is an underlying question inextricably intertwined with the question presented: has the states' Eleventh Amendment immunity been limited by the later enactment of the Fourteenth Amendment to the extent that such limitation

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2 *Dillenberger v. Florida Probation and Parole Commission*, Civ. No. 73-66 (N.D. Fla.); *Wainwright v. State of Florida Department of Transportation*, Civ. No. 73-42 (N.D. Fla.); *Graham v. Marshall*, Civ. No. T-73-77 (N.D. Fla.); *Vanguard Justice Society v. Mandel*, No. 74-71-K (D. Md.); *Liberles v. Daniel*, No. 73-C-3217 (N.D. Ill.); *Pegues v. Mississippi State Employment Services*, No. 72-4-S (N.D. Miss.) — all from petition for writ of certiorari, p. 14, in No. 74-403, *Jordan v. Gilligan, supra.*

Some other pending cases with this question are *Van Yerrell v. Maryland State Highway Admr.*, Civ. B 74-21 (D. Md.); *NOW v. University College of Univ. of Alabama*, Civ. 74-G-1378-S (N.D. Ala.); *Cramer v. Virginia Commonwealth Univ.*, Civ. 75-0271R (E.D. Va.); *Lancaster v. California State Personnel Bd.*, Civ. 75-1890 LTL (C.D. Cal.).

is appropriate or necessary in order to effectuate the purposes of the Fourteenth Amendment and the intention of Congress in enacting anti-discrimination legislation under Section 5? In *Ex Parte Young,* 209 U.S. 123 (1908), this Court expressly left open the question of whether the Eleventh Amendment had been limited by the later enactment of the Fourteenth.[3] In *Edelman v. Jordan, supra,* two members of this Court concluded that question was still unresolved.[4] In *Jordan v. Gilligan, supra,* however, the Sixth Circuit concluded that this Court in *Edelman* had decided, *sub silentio,* that the Eleventh Amendment limited the power of the federal courts to provide remedies for violations of the Fourteenth:

> "Claims for money against a state can arise in three separate legal frameworks...Third, it may be based on the Fourteenth amendment, which binds the states directly and under §5 of which Congress has the power to create remedies...Justice Marshall is technically correct that *Edelman* does not dispose of the Third category. But the majority opinion expressly overrules *Shapiro v. Thompson, supra; State Department of Health and Rehabilitative Services v. Zarate, supra,* and

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3 "We think that, whatever the rights of complainants may be, they are largely founded upon that [Fourteenth] Amendment, but a decision in this case does not require an examination or decision of the question whether its adoption in any way altered or limited the effect of the earlier [Eleventh] Amendment". 209 U.S. at 150.

4 "It should be noted that there has been no determination in this case that state action is unconstitutional under the Fourteenth Amendment. Thus, the Court necessarily does not decide whether the States' Eleventh Amendment sovereign immunity may have been limited by the later enactment of the Fourteenth Amendment to the extent that such a limitation is necessary to effectuate the purposes of that Amendment, an argument advanced by an *amicus* in this case." 415 U.S. at 694, n.2; *cf. Curtis v. Loether,* 415 U.S. 189, 198, n.15 (1974).

> *Wyman v. Bowens, supra,* all Fourteenth amendment cases. We think *Edelman* must be read as closing the door on any money award from a state treasury in any category." 500 F.2nd at 709.

The Third Circuit had used this language in concluding that the Eleventh Amendment limits remedies under the Fourteenth. *Skehan v. Board of Trustees of Bloomsburg State College,* 501 F.2d 31, 43, n.7 (3d Cir. 1974) Similarly, the Second Circuit has also in effect decided the question left open by this Court and extended *Edelman* to preclude at least a back pay award from Connecticut's treasury. Similarly, the Second Circuit cited (App. p. 23a) some of the same inapposite cases which do not involve enforcement of underlying claims arising from violations of substantive rights secured by the 14th Amendment. In *Shapiro v. Thompson,* 394 U.S. 618 (1969) it was held that Congress could not authorize the states to violate the Equal Protection clause by a section of the Social Security Act which authorized a one-year waiting period for welfare benefits; this Congressional action was almost the opposite of what Congress did in 1972 in amending Title VII.[5]

3. *Edelman is not controlling:* *Edelman,* however, involved different facts and a different question than presented by petitioners. There plaintiffs sought to enforce pursuant to 42 U.S.C. §1983 rights granted under federal welfare legislation. 1983, however, did not explicitly

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5 Moreover the related question of attorneys' fees has already resulted in a conflict among the Circuits and thus supplies the State of Connecticut a firm basis on which to petition this Court for certiorari on that question. Petitioners here will not object to such petition because of such conflict, the close relation to the question here presented, and indeed the importance of the attorneys' fees question. See Petition for writ of certiorari in *Jordan v. Gilligan, supra.* That question can of course be narrowly decided, as the Second Circuit has done, to award attorneys' fees. However, the denial of fees and backpay would effectively deter private actions to enforce Title VII.

authorize suit against the state but only against persons, such as state officials, acting "under color of State law". That is the reason only prospective injunctive relief was available under 1983, and not an order for retroactive payment of wrongfully withheld welfare benefits.

> "But it has not heretofore been suggested that sec. 1983 was intended to create a waiver of a State's Eleventh Amendment immunity merely because an action could be brought under that section against state officers, rather than against the State itself." 415 U.S. at 675-7.

The Court also said, "...in this case the threshold fact of Congressional authorization to sue a class of defendants which literally includes States is wholly absent". 415 U.S. at 672. In the instant case Congress did authorize private damage suits against states – and the question therefore is the scope of its power under Section 5 to authorize such relief from the states in order to fully effectuate Fourteenth Amendment protections against discrimination. Congress' action in literally including States thus satisfies one of the two "tests" of *Edelman* which would allow private damage suits against states *notwithstanding* the Eleventh Amendment.[6]

4. *Eleventh Amendment immunity abrogated or waived by adoption of Fourteenth Amendment:* *Edelman's* other test, the states' consent "to abrogation of the Eleventh Amendment shield", has also been satisfied, although such consent is unnecessary due to the Fourteenth Amendment. In the vital area of civil rights with which this action is concerned, the Eleventh Amendment has either been abrogated, *pro tanto,* by the subsequently adopted

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6 Furthermore, *Edelman* did not consider the private attorney general mandate of Title VII which petitioners urged below and which the Second Circuit inadequately answered at App. p. 21-a, n.18.

Fourteenth (and Thirteenth and Fifteenth) Amendments, or at least by the ratification of those amendments, which constituted a "waiver" by the States of their immunity to the extent of substantive rights protected by such Amendments, especially the Fourteenth Amendment right to "equal protection". Inasmuch as the Reconstruction Amendments were, by their essential nature, inconsistent with the existence of a sovereign immunity defense, the states by ratifying those amendments waived to a limited extent their general right not to be sued by a private citizen. Those amendments, together with the statutes enforcing them, created a panoply of federal rights designed to implement the new national commitment to racial justice. Congress clearly conceived that the Amendments were part of the "basic alteration of our federal system wrought in the reconstruction era" and worked a "vast transformation" from the concepts of federalism that had prevailed in the late 18th century. *Mitchum v. Foster,* 407 U.S. 225, 238-239, 242 (1972); *Zwickler v. Koota,* 389 U.S. 241, 245-46 (1967). These changes were understood to work a substantial restriction on the prior sovereignty and reserved rights of the states and were opposed on just that ground. Congressman Shanklin protested that the Fourteenth Amendment struck down "the reserved rights of the states". Cong. Globe, 39th Cong. 1st Sess. 1865-66. Such objections, however, were to no effect, for such a restriction on state power and sovereignty was precisely the goal of the proponents of these measures who believed that the rights of the states ought not include "the right to defeat the very object for which all government is made...to inflict wrongs on free citizens by a denial of the full protection of the laws." Cong. Globe, 42nd Cong. 1st Sess. 84-85 App. (Remarks of Congressman Bingham). Thus the Reconstruction Amendments created precisely the circumstance in which immunity had no place, by stripping the states of their hitherto existing sovereign power to sanction slavery, deny equal protection or due process of the laws, or abridge the right to vote on account of race. In the limited areas prescribed by these Amendments the states

have no authority the exercise of which can be protected from litigation authorized by Congress.

This Court has long recognized the enormous impact of these amendments on state sovereignty. *Ex Parte Virginia,* 100 U.S. 339, 347-8 (1879). In *Prout v. Starr,* 188 U.S. 537, 543 (1903) this Court indicated the inapplicability of the Eleventh Amendment when state enactments disregarded the salutary provisions of the Fourteenth. Also in *General Oil Company v. Crain,* 209 U.S. 211, 226, 227 (1908) this Court recognized that if the Eleventh Amendment precluded the award of necessary and proper relief in cases under the Fourteenth, "the 14th Amendment, which is directed at state action, could be nullified as to much of its operation". In racial discrimination cases the argument was repeatedly raised that private citizens could not enforce their constitutional rights in federal court because of the Eleventh Amendment and sovereign immunity; but, relying on *Ex Parte Young, supra,* this Court summarily and unanimously rejected this contention in *Griffin v. School Board of Prince Edward County,* 377 U.S. 218, 228 (1964). See also *South Carolina v. Katzenbach,* 383 U.S. 301, 325-7 (1966), indicating the broad powers of Congress under the Fifteenth Amendment.

When the two amendments are in conflict the more specific and recent provisions must prevail. See *The Virginia Coupon Cases,* 114 U.S. 269, 331 (1885); *Chicago & N.W.R. Co. v. United Transportation Union,* 402 U.S. 570, 582 (1971). Sovereign immunity is merely a procedural protection for the sovereign powers of the states, *Chisholm v. Georgia,* 2 Dall. 419, 429 (1793) (Iredell J., dissenting); and that immunity has no application in areas where the Fourteenth Amendment has stripped the states of their sovereign power. See *Mitchum v. Foster, supra,* 407 U.S. at 242. That the Eleventh Amendment should be construed to limit remedies under the Fourteenth is particularly inappropriate in view of the fact that the framers of the Fourteenth believed the rights described therein already

existed by virtue of the privileges and immunities clause and the Bill of Rights, and proposed the Amendment to assure that there would be a remedy to redress violations of those rights. See generally ten Broek, *Equal Under Law* (1965); Graham, "The Early Anti-Slavery Backgrounds of the Fourteenth Amendment", 1950 Wis. L. Rev. 479; Graham, "The 'Conspiracy Theory' of the Fourteenth Amendment," 47 Yale L.J. 371 (1938). Congress has the power under Section 5 to fully protect state employees from discrimination, and the Eleventh Amendment cannot limit that power.

5. *Second Circuit's alternatives are wrong:* The Second Circuit erred in asserting Congress had at its disposal in enforcing Fourteenth Amendment rights methods other than federal damage suits, and then suggesting non-private or state-oriented methods. This is contrary to the history of the adoption of the Fourteenth Amendment, legislation such as 42 U.S.C. §1981-1983, and the specific mandate of Congress in enacting Title VII and its 1972 amendment, all of which manifest an intent to make the federal courts the first line of defense in civil rights matters, usually in suits by private litigants.

> "After the War between the States, 'nationalism dominated political thought and brought with it congressional investiture of the federal judiciary with enormously increased powers'. *Zwickler v. Koota,* 389 U.S. 241, 246 (1967). Section 1983 was enacted at that time as §1 of the Civil Rights Act of 1871, 17 Stat. 13 *Id.* at 247. That Act, and the Judiciary Act of 1875, that granted the federal courts general federal question jurisdiction, completely altered Congress' pre-Civil War policy of relying on state courts to vindicate rights arising under the Constitution and federal laws. *Id.* at 245-246." *Huffman v. Pursue Ltd.,* — U.S. — , 95 S.Ct. 1200, 1212 at 1214 (1975) (Brennan, J. dissenting).

In *Alexander v. Gardner-Denver Company,* 415 U.S. 36, 45, 47 (1974), this Court found that Congress considered that private enforcement of Title VII was a paramount objective and that the policy against discrimination was of the highest priority. As to the former:

> "In addition to reposing ultimate authority in federal courts, Congress gave private individuals a significant role in the enforcement process of Title VII....the private right of action remains an essential means of obtaining judicial enforcement of Title VII.... In such a case the private litigant not only redresses his own injury but also vindicates the important Congressional policy against discriminatory employment practices."

Here, petitioners are "private attorneys general" acting instead of the EEOC or the Attorney General, whose backlog and insufficient staff or resources cannot seek redress for all those governmental employees who are victims of discrimination. Furthermore, there is reason to believe that the Attorney General, in Title VII suits against states, will be unwilling or reluctant to claim backpay relief.

In addition, the Second Circuit's suggestions are contrary to the history and tradition of most civil rights litigation. Where would efforts to end racial discrimination in Southern schools be – not to mention other forms of discrimination in all geographical areas – without private litigants in federal courts? The suggestion overlooks the actual experience with states. Connecticut may, for instance, support the paramount national policy with a plethora of anti-discrimination legislation, yet it curiously seeks to avoid monetary redress to its citizen-employees when it has erred. Connecticut's legislature failed in two successive annual sessions following the 1972 Amendments to Title VII and this lawsuit, to conform to the mandate of Congress by eliminating the discrimination manifested in the very language of its retirement laws. Connecticut thus necessitated a federal court injunction – and in the process

gained time at the expense of retired employees which generated the very issue now presented to this Court. This response on the part of the employer-state is no different from that which this Court recently indicated might be expected from a private employer if an award of back pay were not sought.

> "If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality... It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination. This is shown by the very fact that Congress took care to arm the courts with full equitable powers... Furthermore, in passing the Equal Employment Opportunity Act of 1972, Congress considered several bills to limit the judicial power to award backpay. These limiting efforts were rejected...backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy...", *Albermarle Paper Company v. Moody, supra,* — U.S. at — ; 95 S. Ct. at 2371-73.

Whatever states may say in statutes and do about discrimination in the future, even an enlightened state like Connecticut has shown that it must be brought into federal court where its employees are involved; and it will there assert any defenses available to "maintain its treasury" whatever its commitment to ending discrimination might otherwise be. In other words, Connecticut has shown the recalcitrance in regard to civil rights when its own interests are at stake which continues to justify the lack of confidence in state action that the framers of the Fourteenth Amendment and the early Civil Rights Acts saw so well over 100 years ago. If the Eleventh Amendment bars necessary relief to employees who have been the victims of discrimination at the hands of the state which employs them, their plight is little better than those of

whom Congressman Bingham spoke, in support of the 1871 Civil Rights Act:

> "The States did deny to citizens the equal protection of the laws, they did deny the rights of citizens under the Constitution, and except to the extent of the express limitations upon the States, as I have shown, the citizen had no remedy. They denied trial by jury, and *he had no remedy*. They took property without compensation, and *he had no remedy*. They restricted the freedom of the press, and *he had no remedy*. They restricted the freedom of speech, and *he had no remedy*. They restricted the rights of conscience, and *he had no remedy*. They bought and sold men *who had no remedy*. "Cong. Globe, 42nd Cong. 1st Sess. 85 App. (Emphasis added.)

This Court should restore their remedy, as Congress mandated under Section 5 of the Fourteenth Amendment.

CONCLUSION

For the above reasons, a Writ of Certiorari should be issued to review the judgment and opinion of the Second Circuit.

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 740—September Term, 1974.

(Argued March 10, 1975 Decided June 2, 1975.)

Docket No. 74-2581

GARLAND M. FITZPATRICK, SAUL STEIN, WILLIAM SLOCUM, THOMAS H. ELLIOT, DONALD MATHEWS, and MORTIMER COVERT,

Plaintiffs,

DONALD MATTHEWS, MORTIMER COVERT,

Plaintiffs-Appellants.

—against—

FREDERICK BITZER, Chairman of the State Employees' Retirement Commission, ROBERT I. HERDON, Treasurer of the State of Connecticut, and NATHAN G. AGOSTINELLI, Comptroller of the State of Connecticut,

Defendants-Appellees.

Before:

MOORE, MANSFIELD and GURFEIN,

Circuit Judges.

Appeal by plaintiffs, male state employees or former state employees who were members of a retirement plan established by the Connecticut State Employees' Retirement Act, from a decision of the United States District Court for the District of Connecticut, T. Emmet Clarie, *Chief Judge,* which enjoined enforcement of provisions of the Retirement Act found to discriminate unlawfully on the basis of sex in violation of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§2000e, *et seq.*, as amended, but refused to award retroactive benefits or attorneys' fees to plaintiffs on the ground that the Federal District Court was without jurisdiction to enter such an award under the Eleventh Amendment to the United States Constitution.

Reversed and remanded on the matter of attorneys' fees: in all other respects affirmed.

PAUL W. ORTH, Esq., Hartford, Conn. (Austin Carey, Jr., Esq., Hoppin, Carey & Powell, Hartford, Conn., of counsel), *for Appellants.*

SIDNEY D. GIBER, Assistant Attorney General, Hartford, Conn. (Carl R. Ajello, Attorney General of the State of Connecticut, F. Michael Ahern, Assistant Attorney General, Hartford, Conn., of counsel), *for Appellees.*

WILLIAM A. CAREY, General Counsel, Washington, D.C. (Joseph T. Eddins, Associate General Counsel, Beatrice Rosenberg, Charles L. Reischel, Susan J. Johnson, Attorneys, Equal Employment Opportunity Commission, Washington, D.C., of counsel), *for United States Equal Employment Opportunity Commission as Amicus Curiae.*

MANSFIELD, *Circuit Judge:*

The principal question on this appeal is whether, in a suit against a state by its employees attacking its retirement plan as discriminating on the basis of sex in viola-

tion of Title VII of the Civil Rights Act of 1964, the Eleventh Amendment bars a federal court from granting, in addition to injunctive relief, monetary damages and attorneys' fees. We hold that the state is shielded by the Eleventh Amendment against an award of damages but not against an award of attorneys' fees that is ancillary to the permissible grant of prospective injunctive relief.

This litigation was brought by the named plaintiffs as a class action on behalf of all present and retired male employees of the State of Connecticut who were members of the State Employees' Retirement System, a retirement benefit plan established by the State Employees Retirement Act, Conn. Gen. Stat. §§5-152 to 5-192 ("Retirement Act" herein). Asserting equal protection claims under the Fourteenth Amendment and statutory violations under 42 U.S.C. §1983, plaintiffs sought declaratory and injunctive relief against the State Treasurer, State Comptroller, and the Chairman of the State Employees' Retirement Commission, to restrain continued enforcement by those officials of sexually discriminatory provisions of the Retirement Act. Plaintiffs objected to §§5-162, 5-163 and 5-166, which grant to women employees having 25 or more years of state service the right to retire with pension rights five (5) years earlier than similarly situated men, and further provide rate differentials favoring female over male employees who retire with less than 25 years of state service.

A three-judge court was convened to hear the case, 28 U.S.C. §§2281, 2284 but on October 15, 1973, plaintiffs amended their complaint to add a count alleging that the Retirement Act violated Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§2000e, *et seq.* Title VII, which originally did not apply to state governments, had been amended by Public Law No. 92-261, 86 Stat. 103, effective

March 24, 1972, to bring the states within its purview.[1] After the amendment of the complaint, the case was remanded to Chief Judge Clarie, sitting as a single district judge, for resolution of the claims under federal statutory law, see 28 U.S.C. §2281.[2]

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1 Section 2000e(a) of 42 U.S.C. was amended to provide that a "person" who can be an "employer" under Title VII includes "governments, governmental agencies [and] political subdivisions."

2 The three-judge court, in an opinion issued on June 10, 1974, determined that the federal statutory claim was "substantial" and remanded the case. Since an action for injunctive relief against a state statute, which is based on *both* federal constitutional and non-constitutional grounds, as is the present action, must be heard and determined by a three-judge court under 28 U.S.C. §2281, *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen*, 362 U.S. 73, 76-77 (1960), until recently the propriety of this remand may have been questioned. Since *Florida Lime*, however, the Court has held that a three-judge court need not be convened in an action to enjoin a state statute solely on the ground that it conflicts with a federal statute, *Swift & Co.* v. *Wickham*, 382 U.S. 111 (1965), and that, where a properly convened three-judge court is confronted with a case presenting both constitutional and non-constitutional grounds, it should first adjudicate the non-constitutional claim, *Rosado* v. *Wyman*, 397 U.S. 397, 402 (1970); *King* v. *Smith*, 392 U.S. 309 (1968).

The *Rosado* Court suggested that in that case "the most appropriate course may well have been to remand to the single district judge for findings and determination of the statutory claim," 397 U.S. at 403, and this suggestion seems to have been firmly adopted by the Court in *Hagans* v. *Lavine*, 415 U.S. 528 (1974). In *Hagans* the district court, sitting alone, had determined the substantiality of the constitutional claims but then proceeded to consider on the merits the statutory claim without first convening a three-judge court. The Supreme Court approved this procedure, observing that if a three-judge court had been convened, "in view of what we have said in Rosado . . . [the three-judge panel] could then merely pass the statutory claim back to the single judge." 415 U.S. at 544. See also *Doe* v. *Lavine*, 347 F. Supp. 357, 359-60 (S.D.N.Y. 1972) (Gurfein, *J.*). The single district judge thus had power to hear the statutory claim. Since Judge Clarie granted the injunction, we do not face the problem in *Morrow* v. *Clifford*, 502 F.2d 1066 (3d Cir. 1974), criticized in 88 Harv. L. Rev. 1028 (1975), holding that the power of the single district judge in these circumstances does not extend to the *denial* of an injunction.

For the same reasons this court has jurisdiction of the present appeal, even though the statutory claim decided below might have been properly

After a hearing on the merits, Chief Judge Clarie, in a thorough opinion, found that retirement benefits fall within the language "compensation, terms, conditions, or privileges of employment" as used in Title VII and that such benefits are barred by Title VII from being made the subject of sex discrimination. 42 U.S.C. §2000e-2(a)(1). He further determined that the Retirement Act violates Title VII insofar as it discriminates in favor of women over men in the number of years of service eligibility required for retirement and in the computation of retirement benefits. See —— F. Supp. —— (D. Conn. 1974). He rejected defendants' contention that this suit was in reality one against the State of Connecticut and as such barred from federal court by the Eleventh Amendment to the Constitution, since the defendants here were sued individually and the state's immunity is not shared by state officials who act unconstitutionally or contrary to federal law. *Ex Parte Young*, 209 U.S. 123 (1908); *Scheuer* v. *Rhodes*, 416 U.S. 232, 237 (1974). Defendants did not appeal from the court's determination that the Retirement Act violates Title VII, nor from the injunction against future payments from the Retirement Fund or from other state moneys under the Retirement System in a manner which would discriminate against men on the basis of sex.

The section of Title VII prescribing remedies which a court may employ against violation of that title states that, in addition to enjoining an unlawful employment practice, the court may

> "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement

decided by the three judge panel, see *King* v. *Smith*, *supra*, in which event the appeal would lie only to the Supreme Court, 28 U.S.C. §1253. See *Hagans* v. *Lavine*, *supra*, 415 U.S. at 543.

> or hiring of employees with or without back pay . . . or any other equitable relief as the court deems appropriate." 42 U.S.C. §2000e-5(g).

In addition to injunctive relief, plaintiffs also sought in their complaint an order requiring defendants to recalculate for all living retired male employees the benefits to which similarly situated female employees would have been entitled, and to pay out to the retired male employees the difference between the recalculated benefits and the benefits actually received.[3] Costs and reasonable attorneys' fees were also demanded pursuant to 42 U.S.C. §2000e-5(k).[4] Chief Judge Clarie, however, determined that under the Supreme Court's recent decision in *Edelman* v. *Jordan*, 415 U.S. 651 (1974), a federal court is barred by the Eleventh Amendment, absent the state's waiver or consent, from awarding a retroactive money judgment that would be satisfied by a "payment of funds from the state treasury." 415 U.S. at 677.

On this appeal plaintiffs argue that there are several critical factors present in this case that did not confront the *Edelman* court. While we agree that *Edelman* v. *Jordan* is not in all respects controlling in this case, we believe Judge Clarie correctly resolved the Eleventh Amendment issue with respect to the back pay claim, and affirm. We reverse his holding, however, insofar as it barred the attorneys' fee claim.

3 Plaintiffs suggested several time periods which might be appropriate for the calculation of retrospective benefits. Judge Clarie did not determine which is appropriate, and in view of our holding, we also find it unnecessary to reach this question.

4 Section 2000e-5(k) provides:

> "(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."

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Discussion

The Eleventh Amendment to the Constitution states:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

Adopted in 1798, the Amendment was enacted in direct response to widespread dissatisfaction with the Supreme Court's 1793 decision in *Chisholm* v. *Georgia*, 2 Dall. 419, which held that under Article III, §2,[5] federal jurisdiction extended to a suit against the State of Georgia brought by South Carolina citizens to collect a debt owed by that state to an estate of which plaintiffs were executors.[6] Since the Amendment was intended to reverse the *Chisholm* decision,[7] it has been interpreted not literally but according to its purpose of restoring to Article III the

5 Article III, §2, clause 1 provides:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

6 See 1 C. Warren, *The Supreme Court in United States History* 96 (1922). Warren observes that the surprise with which the *Chisholm* decision was greeted is attributable to the fact that 'the vesting of any such jurisdiction over the sovereign states had been expressly disclaimed and even resented by the great defenders of the Constitution, during the days of the contest over its adoption." *Id.*

7 See Cullison, *Interpretation of the Eleventh Amendment*, 5 Houston L. Rev. 1, 6-14 (1967).

"fundamental rule of jurisprudence" that "a state may not be sued without its consent," *Ex Parte New York*, 256 U.S. 490, 497 (1921). For instance, in fulfillment of the overall objective of protecting the sovereign immunity of the states the Court has decided that a suit for damages against a state by a citizen of the *same* state, though not specifically prohibited by the Amendment's language, is barred. *Hans* v. *Louisiana*, 134 U.S. 1 (1890). See also, e.g., *Principality of Monaco* v. *Mississippi*, 292 U.S. 313 (1934) (suits by foreign countries as well as foreign citizens barred); *Ex Parte New York, supra* (state immune from private actions in admiralty as well as "suits in law or equity").

Likewise following this principle, the Supreme Court has long held that even though the state is not a named party the shield provided by the Amendment may in an appropriate case be invoked by the defendants, see, e.g., *In re Ayers*, 123 U.S. 443 (1887); *Louisiana* v. *Jumel*, 107 U.S. 711 (1882). Looking to substance rather than to form, the Court decided that immunity should not depend on "the mere names of the titular parties but . . . the essential nature and effect of the proceeding, as it appears from the entire record." *Ex Parte New York*, 256 U.S. 490, 500 (1921); see *Hagood* v. *Southern*, 117 U.S. 52, 67 (1886); *Smith* v. *Reeves*, 178 U.S. 436, 438-40 (1900). "[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest . . . ," *Ford Motor Co.* v. *Department of the Treasury*, 323 U.S. 459, 464 (1945), and the Eleventh Amendment bars a private suit "seeking to impose a liability which must be paid from public funds in the state treasury . . . ," *Edelman* v. *Jordan*, 415 U.S. 651, 663 (1974); see *Kennecott Copper Corp.* v. *State Tax Comm'n*, 327 U.S. 573 (1946); *Great Northern Life Ins. Co.* v. *Read*, 322 U.S. 47 (1944).

On the other side of the coin, the Eleventh Amendment does not bar a suit to enjoin enforcement by a state officer of an unconstitutional state statute. *Ex Parte Young*, 209 U.S. 123 (1908). The Court, in reaching this result, relied on the common law principle that a state officer acting illegally is deemed to act "without the authority of" the state and therefore outside its shield of sovereign immunity. 209 U.S. at 159-60. Furthermore, although the Eleventh Amendment shields the state against a retroactive award of monetary damages payable out of the state treasury as compensation for its past breach of a legal duty, a judgment requiring a state to expend some public funds in connection with obtaining or implementing injunctive relief against it is permissible, even though the award in such a case has "an ancillary effect on the state treasury," *Edelman* v. *Jordan*, 415 U.S. 651, 668 (1974); *Jordan* v. *Fusari*, 496 F.2d 646, 651 (2d Cir. 1974).

Plaintiffs here contend that the "recalculated benefits" sought by them would be paid neither by the defendants personally nor out of "public funds in the state treasury" but from the Retirement Fund[8] pursuant to Conn. Gen. Stat. 5-156 which provides:

> "All member contributions and state appropriations shall be held in a *separate retirement fund* by the treasurer, who may invest and reinvest as much of the fund as is not required for current disbursements...." (Emphasis added).

Since all retirement benefit moneys are first paid into this "separate fund," plaintiffs argue that this case does not come within the rule of *Ford Motor Co.* and *Edelman* and

8 Plaintiffs have apparently changed their view of the source of the award of back benefits. Their amended complaint simply sought an award from "the retirement fund *and/or state moneys*." (Emphasis added).

that the Eleventh Amendment is therefore no bar to the action. Although the defendants did not deem this argument worthy of response in their brief, the substantiality of plaintiffs' assertion has been focused by a recent District of Rhode Island decision holding that Rhode Island's state retirement fund was unprotected by the state's Eleventh Amendment shield. *Bowen* v. *Hackett*, —— F. Supp. —— (D.R.I. Jan. 16, 1975), Civ. Nos. 5038 and 5043.

In determining whether a separate state agency or institution shares the Eleventh Amendment shield as an "alter ego" of the state, a court must look to numerous factors, no one of which is conclusive, see *Krisel* v. *Duran*, 258 F. Supp. 845, 848-49 (S.D.N.Y. 1966) (Weinfeld, *J.*), *aff'd. per curiam*, 386 F.2d 179 (2d Cir. 1967), *cert. denied*, 390 U.S. 1042 (1968); *Zeidner* v. *Wulforst*, 197 F. Supp. 23 (E.D.N.Y. 1961); cf. *State Highway Comm'n* v. *Utah Const. Co.*, 278 U.S. 194, 199 (1929). The most important, of course, is whether, in the event plaintiff prevails, judgment will have to be paid out of the state treasury. *Whitten* v. *State University Const. Fund*, 493 F.2d 177, 180 (1st Cir. 1974) (Moore, *J.*); *Gordenstein* v. *University of Delaware*, 381 F. Supp. 718, 721 (D. Del. 1974); *Bowen* v. *Hackett, supra; Krisel* v. *Duran, supra*, 258 F. Supp. at 849; see *Edelman* v. *Jordan, supra*, 415 U.S. at 663. Also to be considered is whether the entity sued is performing a governmental or proprietary function, whether it has been separately incorporated, whether it has the power to sue and be sued and enter into contracts, the degree of autonomy over its operations, and whether the state has immunized itself from responsibility for the agency's operations. See *Whitten* v. *State University Const. Fund, supra*, 493 F.2d at 179-80; *Gordenstein* v. *University of Delaware, supra; Krisel* v. *Duran, supra*.[9]

9 Determination of the scope of the Eleventh Amendment shield is a matter of federal law, *Matherson* v. *Long Island State Park Comm'n*,

In concluding in *Bowen* v. *Hackett* that the Rhode Island retirement fund was not an "alter ego" of the state, the court found that the fund was created solely from the contributions of employees and that the state had no legal duty to replenish the fund if it should become depleted or pay a judgment against the fund. Here the situation is vastly different. Regardless of whether Connecticut would be liable for a judgment against the Retirement Fund, the state is required to appropriate funds on an actuarial basis, the amount being determined each year, and to pay *at least* 75% of the total retirement income payments for each year. Conn. Gen. Stat. §5-156a. A judgment against the fund would thus automatically increase the obligations of the general state treasury[10] and amount to a judgment against the state. Furthermore, the Connecticut Retirement Fund has none of the indicia of independence from the state, such as separate incorporation or a power to sue in its own name. It is controlled by the state treasurer, see Conn. Gen. Stat. §5-156. Although the money in it may be used only for a designated purpose, it nonetheless remains "public money." *Whitten* v. *State University Const. Fund*, *supra*; *Bowen* v. *Hackett*, *supra*; cf. *Kennecott Copper Corp.* v. *State Dep't of Taxation*, 327 U.S. 573 (1946) (tax payments held in separate fund).

Plaintiffs' argument thus boils down to an assertion that the effect on the general public treasury is permissibly indirect because the state treasury will not feel the pinch until the time comes for the next annual appropriation to the fund. However, this view would distort the meaning

442 F.2d 566, 568 (2d Cir. 1971), but state law must be analyzed to determine the status of the sued entity in the government structure of the state, *Skehan* v. *Board of Trustees*, 501 F.2d 31, 41 (3d Cir. 1974).

10 Conn. Gen. Stat. §5-156 provides that the legislature "shall appropriate" to the retirement fund the amount needed to maintain actuarially required levels.

of the term "ancillary" as used by the Court in *Edelman* and would have the effect of sharply curtailing, if not emasculating, the concept of a "suit against the state." Accordingly, we hold that the action here, insofar as it seeks damages, is in essence against the state and as such is subject to the Eleventh Amendment.[11]

Plaintiffs' major contention is that, even assuming that the action is properly characterized as one against the state which would normally entitle the state to invoke its Eleventh Amendment immunity, the state here has waived that immunity and in effect consented to suit. Although barriers to federal court jurisdiction normally may not be "waived" by the parties, *Mansfield, Coldwater & Lake Michigan Ry.* v. *Swan*, 111 U.S. 379, 384 (1884), it has been long held that a state may consent to a suit that would otherwise be barred by the Eleventh Amendment, see, e.g., *Clark* v. *Barnard*, 108 U.S. 436 (1883), since the purpose of the Amendment is merely to limit federal jurisdiction to those suits to which a state has not consented.

Plaintiffs do not suggest that consent to their suit was expressly or directly given by the State of Connecticut. Rather they argue that waiver or consent may be inferred from certain action taken by the state itself, and that in any event Congress was vested by the Fourteenth Amendment to modify Connecticut's immunity in civil rights suits.

First it is argued that Connecticut waived its immunity by its own enactment of certain laws. Plaintiffs rely on Article II, clause 4 of the state Constitution which provides, "Claims against the state shall be resolved in such manner as may be provided by law." It is sufficient that the Connecticut state courts, albeit in the context of a different type of claim, have determined that this section

11 Although not controlling, another persuasive factor in reaching this conclusion is that Connecticut law treats money in the retirement fund as "public money." *Dowe* v. *Egan*, 133 Conn. 112, 48 A.2d 735 (1946).

does not waive sovereign immunity, *Fidelity Bank* v. *State of Connecticut*, 35 Conn. L.J. No. 39 (March 26, 1974). But even if Connecticut allowed suit against it in the context of a claim for damages due to discrimination, it is settled that a state may "give its consent to be sued in its own courts by private persons or by corporations, in respect of any cause of action against it and at the same time exclude the jurisdiction of the Federal courts . . .," *Smith* v. *Reeves*, 178 U.S. 436, 445 (1900).[12] Indeed unless a "clear indication" to submit to suit in federal as well as state court can be found, a federal court cannot read the state's consent to be sued in its own courts as embracing federal jurisdiction. *Great Northern Life Ins. Co.* v. *Read*, 332 U.S. 47, 54 (1944); *Knight* v. *State of New York*, 443 F.2d 415, 419 (2d Cir. 1971) (Friendly, *J.*). Here, there is not the slightest indication of intent to submit to federal suit.

For the same reasons plaintiffs' citation of various provisions of the Connecticut Constitution and statutes prohibiting discrimination in that state is of no avail. See, e.g., Conn. Const. Art. I, §20, Conn. Gen. Stat. §§4-61c to 4-61j. Even if these sections authorized a damage action for discrimination against the state, no possible inference could be drawn that the state had also consented to a similar action in federal court. *Great Northern Life*, *supra*; *Knight* v. *State of New York*, *supra*.

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12 The *Smith* v. *Reeves* Court noted that the state's power to limit its consent is

> "subject always to the condition, arising out of the supremacy of the Constitution of the United States and the laws made in pursuance thereof, that the final judgment of the highest court of the State in any action brought against it with its consent may be reviewed or reexamined, as prescribed by the act of Congress, if it denies to the plaintiff any right, title, privilege or immunity secured to him and specially claimed under the Constitution or laws of the United States." 178 U.S. at 445.

Before reaching the more troublesome question of whether Connecticut has waived its immunity by engaging in activity subject to Congressional regulation under the Fourteenth Amendment, we must first determine whether Title VII as amended has authorized a private action for damages against the state. If it has not, that would be the end of the matter, since in the absence of Congressional authorization plaintiffs would be out of court. Serious doubts are raised as to existence of such authority by the Supreme Court's recent decision in *Employees* v. *Department of Public Health & Welfare*, 411 U.S. 279 (1973), where it faced a similar problem under the Fair Labor Standards Act (FLSA), 29 U.S.C. §§200, *et seq.* In 1966 the FLSA, which regulates the working conditions of those producing goods for commerce, was amended to bring within its scope state-operated hospitals and the employees thereof, see Pub. L. 89-601, 80 Stat. 830-32, 837 (Sept. 23, 1966). Prior thereto states had been excluded from the Act. Section 16(b) of FLSA, 29 U.S.C. §216(b), which authorized a private action against an employer for amounts of unpaid minimum wages or overtime compensation in "any court of competent jurisdiction," remained unchanged by the 1966 Amendments. The Court held that although Missouri was covered by the "literal" language of the FLSA and subject to its substantive provisions, *Maryland* v. *Wirtz*, 392 U.S. 183 (1968), Congress had not sufficiently indicated an intention to sweep away Missouri's immunity from private suit. In reaching this conclusion the Court relied upon several circumstances: Congress' failure to change the remedial provisions of §16(b) in amending the Act; the harshness of the monetary penalties provided by the Act in addition to recovery of actual damages; and the Act's provision for its enforcement by the Secretary of Labor in federal court and apparently by any party in state court.

411 U.S. at 285-86. The Court concluded that the "delicate federal-state relationship" was preserved under the Act by remitting private parties to federal court relief only through the Secretary of Labor. *Id.*

The amendments to Title VII, like those to the FLSA, merely changed the definition of "employer" to include the states,[13] and did not specifically deal with the question of a state's immunity from suit. Nor does Title VII's legislative history reveal a specific intention to lift that immunity. However, it is evident that the 1972 amendments to Title VII, unlike the amendments to the FLSA reviewed by the court in *Employees*, did contemplate private actions against state governments or their agencies. Title 42 U.S.C. §2000e-5(f)(1), the relevant portion of which is set out in the margin,[14] spells out the manner

13 See note 1 *supra*.

14 "(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which

in which a civil action may be brought after a complaint is filed with the Commission. Actions against a "government, governmental agency or political subdivision" may be prosecuted in the first instance only by the Attorney General, but aggrieved employees may intervene in such an action. If the Attorney General does not commence the action or enter into a conciliation agreement within 180 days, the aggrieved employees may commence a private suit against the government or governmental agency within 90 days thereafter. By providing these special procedures for suits involving governments, Congress here demonstrated an intention to make available in some cases private suits against governments. That *state* employees were to be put on a par with all other employees is evidenced by statements in both the House and Senate Reports accompanying the 1972 amendments to the effect that all state and local government employees were to have access to the remedies available under the Act.[15]

the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice."

15 The House Report of the 1972 Act notes:

"Few of [the many state and local government] employees are afforded the protection of an effective forum to assure equal employment. The bill amends section 701 of the Civil Rights Act of 1964 . . . to include State and local governments, governmental agencies and political subdivisions within the definition of 'employer' under Title VII. *All State and local government employees would under the bill have access to the remedies available under the Act.*" House Rep. No. 92-238 (92d Cong., 1st Sess. 1971), 1972 U.S. Code Cong. & Admin. News at 2152 (emphasis added).

Similarly, the Senate Report stated:

"The Committee believes that employees of State and local governments are entitled to the same benefits and protections in equal

Thus, unlike the situation in *Employees*, Congress intended to authorize a private suit for backpay by state employees against the state. To suggest otherwise would be to hold Congress to a degree of legislative specificity it could not and does not customarily meet. See *Employees* v. *Department of Public Health & Welfare*, 411 U.S. at 289-90 (Marshall, *J.*, concurring).

Although we must conclude that Congress authorized private damage suits against the states for violation of Title VII, we reject any suggestion that an inference of voluntary waiver or consent may be drawn from the state's mere continuance of its governmental function of hiring employees to perform state duties and of providing for their working conditions, including retirements. It is obvious that Connecticut, which had engaged in these activities as an essential part of its functions long before Title VII was amended to include the states, would, regardless of the amendment, have no choice but to continue doing so thereafter or cease functioning as a state. Thus no basis exists for finding voluntary waiver. Cf. *Fay* v. *Noia*, 372 U.S. 391, 439 (1963); *Johnson* v. *Zerbst*, 304 U.S. 458 (1938). See Note, Private Suits Against States in Federal Courts, 33 U. Chi. L. Rev. 331, 336 (1966). Although its continued engagement in these activities might conceivably be labelled a "constructive" consent, the Supreme Court in *Edelman* v. *Jordan*, 415 U.S. 651, 673 (1974), stated that "[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here."

employment as the employees in the private industry section of the economy.

". . . By amending the present section 701 to include state and local governmental units within the definition of an 'employer' under Title VII, all State and local governmental employees would, under the provisions of the bill, have access to the remedies under the Act." Senate Rep. No. 92-415 (92d Cong., 1st Sess. 1971) in *Legislative History of the Equal Employment Opportunity Act of 1972* at 418.

Parden v. *Terminal Ry. Co.*, 377 U.S. 184 (1964), relied upon by plaintiffs, is clearly inapposite. There the State of Alabama, in face of the fact that interstate railroads were subject to the Federal Employees Liability Act, 45 U.S.C. §§51, *et seq.*, and had been subjected to extensive regulation by Congress, see *California* v. *Taylor*, 353 U.S. 553 (1957) (state-owned railroad subject to Railway Labor Act); *United States* v. *California*, 297 U.S. 175 (1936) (same subject to Federal Safety Appliance Act), undertook the operation of such a railroad, which was essentially a proprietary business. In these circumstances a finding of voluntary waiver of constitutional immunity from suit was fully justified. No such situation exists here. Connecticut's employment of its employees and adoption of a retirement system had long predated Title VII.

Plaintiffs next contend that, even assuming that Connecticut has not by its own conduct waived its Eleventh Amendment immunity or consented to suit, Congress nevertheless had the power to subject it to a private action for damages for denial of civil rights. While conceding that Congress cannot expand the scope of federal jurisdiction beyond the limits of the Constitution, *Marbury* v. *Madison*, 1 Cranch 137 (1803), plaintiffs assert that Congress' power may be found in the Fourteenth Amendment, which must be deemed to have modified the Eleventh in the area of civil rights. Plaintiffs point to the history of the Fourteenth Amendment, which evolved from a dissatisfaction with the states' failure to protect the civil rights of their citizens, and to the statements of various Congressmen who objected to the post-Civil War legislation on the ground that it would impair the "sovereignty" of the

States.[16] It is argued that "[i]nasmuch as the post-Civil War amendments were, by their essential nature, inconsistent with the existence of a sovereign immunity defense, the states by ratifying those Amendments waived to a limited extent their general right not to be sued by a private citizen." We disagree.

The question is not as broad as applicants would have it. Essentially it is a narrow one, which deals more with procedure than substance, i.e., whether the particular remedy sought here, a private federal action for retroactive damages, is a constitutionally permissible method of enforcing Fourteenth Amendment rights, notwithstanding the immunity granted to the states by the Eleventh Amendment. Accepting the fact that legislation enforcing individual rights under the Fourteenth Amendment must to some extent subject states to private suits, it does not follow that Congress necessarily has power to provide the particular remedy sought here.[17]

16 For example, plaintiffs quote Congressman Rogers, who, opposing the 1866 Civil Rights Bill, stated:

> "I ask you to stand by the law of the country and to regulate these Federal and State systems upon the grand principles upon which they were intended to be regulated, that we may hand down to those who are to come after us this bright jewel of civil liberty unimpaired; and I say that the Congress or men who will strip the people of these rights will be handed down to perdition for allowing this bright and beautiful heritage of civil liberty embodied in the powers and sovereign jurisdiction of the States to pass away from us." Cong. Globe, 39th Cong., 1st Sess. 1122 23.

17 Plaintiffs argue that the

> "Civil War Amendments created precisely the circumstances in which immunity had no place, by stripping states of their hitherto existing sovereign power to sanction slavery, deny equal protection or due process of laws, or abridge the right to vote on account of race. In the limited areas prescribed by these Amendments the states have *no authority the exercise of which can be protected from litigation*, and in such cases the purpose underlying the Eleventh Amendment cannot be served." (Emphasis added).

This argument suggests that Congress has unlimited power to provide remedies to enforce the Fourteenth Amendment. But the mere fact

To the extent that a tension exists between enforcement of rights under the Fourteenth and the state's immunity under the Eleventh, our duty is to reconcile and give effect to both amendments insofar as possible. See *Prout* v. *Starr*, 188 U.S. 537, 543-44 (1903). Observing that "particularly after the Civil War, Congress undertook to make federal courts the primary guardians of constitutional rights," Justice Brennan in his separate opinion in *Perez* v. *Ledesma*, 401 U.S. 82, 106 (1971), recognized that "*Ex Parte Young* was the culmination of efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution." *Edelman* v. *Jordan*, *supra*, must be read as reaffirming the necessity of maintaining this balance between enforcement of individual constitutional rights and protection of the state's fiscal administration under the Eleventh. See 415 U.S. at 666-69; The Supreme Court, 1973 Term, 88 Harv. L. Rev. 41, 247 (1974).

This desirable balance should not be upset in the context of suits to enforce Fourteenth Amendment rights unless other means that might be made available for enforcement of rights under that Amendment are so ineffective that Congress, in promulgating the Fourteenth Amendment after its adoption by more than three-quarters of the Union, necessarily implied that the Eleventh Amendment's remedial bar to a damage action against a state must yield. There is no reason to find such a necessary implication, however, since Congress, under the balance as reaffirmed in *Edelman*, has at its disposal various methods other than private federal damage suits for enforcing Fourteenth Amendment rights.

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that Congress may constitutionally apply the substantive provisions of certain legislation against the states is not inconsistent with the fact that certain remedies may not be available against the states. *Maryland* v. *Wirtz*, 392 U.S. 183, 200 (1968). See also *California* v. *Taylor*, 353 U.S. 553, 568 n.16 (1957).

The prospective injunctive relief available under *Ex Parte Young*, if it stood alone, should offer adequate relief as a remedy for enforcement of Fourteenth Amendment rights against the states. However, other remedies either are or may be made available. The Eleventh Amendment presents no bar to a suit by the United States against a state, *United States* v. *Mississippi*, 380 U.S. 128 (1965). Congress can authorize a suit by the federal government on a private plaintiff's behalf and it has done so in Title VII. See 42 U.S.C. §2000e-5(f)(1). A suit by the United States against a state to recover back benefits on behalf of persons protected by a federal statute is permissible. *Brennan* v. *State of Iowa*, 494 F.2d 100, 104 (8th Cir. 1974); see *Department of Employment* v. *United States*, 385 U.S. 355 (1966).[18]

Furthermore, although Congress did not suggest that jurisdiction over private actions under Title VII extends to state courts,[19] it might have done so.[20] State courts would

18 Plaintiffs' claim that *United States* v. *Mississippi* authorizes their suit because it was brought "in place of the Attorney General" must, however, be rejected. While it is true that, following the procedures outlined in 42 U.S.C. §2000e-5(f)(1), the instant suit was first referred to the Attorney General, who chose not to sue but issued to the plaintiffs a "right to sue" letter, it can hardly be contended the United States is responsible for the management of this suit, thus meeting the concern of the *Employees* Court for maintaining the "delicate federal-state relationship," see p. 3937, *supra*. Nor can it even be contended that the United States is the real party in interest, cf. *Standing Rock Sioux Indian Tribe* v. *Dorgan*, 505 F.2d 1135, 1140 (8th Cir. 1974). Plaintiffs seek the back benefits solely for themselves; whatever interest the public had in this lawsuit has already been served by entry of the injunction. Moreover the failure of the Attorney General to prosecute this action himself can hardly be characterized as a finding that plaintiffs' suit is of special public interest.

19 See 42 U.S.C. §2000e-5(f)(3).

20 Congress has made state courts available for private federal damage actions against the states under the Fair Labor Standards Act, §16(b), 29 U.S.C.A. §216(b) (1975 Supp.) (as amended April 8, 1974), and the Federal Employers Liability Act, §6, 45 U.S.C. §56.

have faced no constitutional barrier to granting the retrospective damage relief Congress authorized since they are free from the limitations of the Eleventh Amendment, which restrict only federal judicial power.[21] We need not consider whether Congress could, consistently with the Tenth Amendment, compel a state to permit its citizens to enforce their Fourteenth Amendment rights against it in its courts except to note that under the Supremacy Clause and the general principle that state courts are co-equal partners with the federal courts in the enforcement of federal law, see *Employees* v. *Department of Public Health and Welfare*, 411 U.S. 279, 298 (Marshall, *J.*, concurring); *Martin* v. *Hunter's Lessee*, 1 Wheat. 304, 339-40 (1816), state courts have been obligated to entertain congressionally-authorized private suits where state court jurisdiction extends to suits of the same character, see *Testa* v. *Katt*, 330 U.S. 386 (1947).[22]

Thus there is no reason in this case to depart from the balance between the Eleventh Amendment and other constitutional interests which was most recently reaffirmed in *Edelman*. In any event it may not still be open to this court to accept plaintiffs' invitation to disregard the Eleventh Amendment in Fourteenth Amendment cases. While Justice Marshall's dissent in *Edelman* suggested that the Supreme Court had not decided whether the Eleventh

21 Plaintiffs point out that the Fourteenth Amendment was passed at a low ebb of confidence in the willingness of the state courts to comply with this duty, see, e.g., *Mitchum* v. *Foster*, 407 U.S. 225, 240-42 (1972); *Monroe* v. *Pape*, 365 U.S. 167, 174-80 (1961). But even so, there is little need to assume that the duties otherwise imposed on the states would not be sufficient to remedy problems of state recalcitrance without also reading into the Fourteenth Amendment a *sub silentio* elimination of the states' Eleventh Amendment rights.

22 Of course a state might decline to exercise such congressionally-mandated jurisdiction on grounds of sovereign immunity. However, this would pose a problem distinct from the question of the scope of federal remedial power under the Eleventh Amendment.

Amendment is limited by the later enactment of the Fourteenth, 415 U.S. at 694 n.2, the majority in that case expressly overruled *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), *State Department of Health and Rehabilitative Services* v. *Zarate*, 407 U.S. 918 (1972) (per curiam), and *Wyman* v. *Bowens*, 397 U.S. 49 (1970) (per curiam), all cases involving Fourteenth Amendment causes of action, insofar as those cases allowed assessment of retroactive damages against the state. 415 U.S. at 670-71. See also *Wilkerson* v. *Meskill*, 501 F.2d 297 (2d Cir. 1974), in which this court affirmed *per curiam* on the basis of *Edelman* a dismissal of plaintiff's claims to back wages from the state based on equal protection and due process, although without considering the arguments presented here. Further see *Skehan* v. *Board of Trustees*, 501 F.2d 31, 42 n.7 (3d Cir. 1974); *Burton* v. *Waller*, 502 F.2d 1261, 1273 (5th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3474 (U.S. No. 74-875 Mar. 4, 1975).

Plaintiffs' request for costs and attorneys' fees stands on a different footing. While the district court was without jurisdiction to entertain the plaintiffs' claims for retroactive damages against the state, the court did have jurisdiction to entertain the claim for prospective injunctive relief against state officers, *Ex Parte Young*, *supra*, based on the state's failure in its duty to conform its conduct to federal law and its threatened continuation on the same illegal course in the future. In order to invoke the court's power to enjoin such future illegal conduct, it was necessary to incur costs and attorneys' fees which, as we recently held in *Class* v. *Norton*, 505 F.2d 123, 126-27 (2d Cir. 1974), may be assessed as having a permissible "ancillary effect" on the state treasury, see *Edelman* v. *Jordan*, 415 U.S. at 667-68, of a prospective order. See *Sims* v. *Amos*, 409 U.S. 942 (1973), *aff'g*, 340 F. Supp. 693 (M.D.

Ala. 1972) (three-judge court); *Souza* v. *Travisono*, No. 74-1243 (1st Cir. Mar. 11, 1975), Slip Opin. at 4-6. We adhere to *Class* and accordingly decline to join those circuits which have denied attorneys' fees, see *Skehan* v. *Board of Trustees*, 501 F.2d 31, 42 (3d Cir. 1974); *Jordon* v. *Gilligan*, 500 F.2d 701 (6th Cir. 1974); *Taylor* v. *Perini*, 503 F.2d 899, 901 (6th Cir. 1974); *Named Indiv. Members of San Antonio Conservation Soc'y* v. *Texas Highway Dept.*, 496 F.2d 1017, 1026 (5th Cir. 1974).

For the foregoing reasons we remand the case to the district court for the purpose of determining in its sound discretion whether an award of attorneys' fees is appropriate and, if so, the amount that may reasonably be awarded.

Supreme Court, U. S.
FILED
JAN 28 1976

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-251

Garland M. Fitzpatrick, et al.,
Donald Matthews, et al., *Plaintiffs Petitioners*

v.

Frederick Bitzer, Chairman, et al., *Respondents*

No. 75-283

Frederick Bitzer, et al., *Petitioners*

v.

Donald Matthews, et al., *Respondents*

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petition for Certiorari in No. 75-251 filed August 16, 1975
Petition for Certiorari in No. 75-283 filed August 25, 1975
Certiorari Granted in both Cases on December 15, 1975

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NOTE: The Memorandum of Decision of the United States District Court for Connecticut and the Opinion of the Court of Appeals for the Second Circuit are both printed in the Appendix of the Petition for Writ of Certiorari in No. 75-283, starting at pages 2a and 26a respectively.

1.

Garland M. Fitzpatrick, et al. v. J. Frederick Bitzer, et al.

December 11, 1972 Complaint filed at Hartford.**

December 26, 1972 Hearing on Application to Convene a Three-Judge Court. Order endorsed as follows: "The plaintiffs' application for a Three Judge Court, is granted, absent objection; so ordered." Clarie, J.

January 10, 1973 Answer, filed by defendants.

January 17, 1973 Designation of Judges, entered.

April 10, 1973 Interrogatories to Defendants, filed by plaintiffs.

May 29, 1973 Re: Hearing on the Merits — "Over to Sept. per T.E.C. (may become moot)"

August 14, 1973 Defendants' Answers to Interrogatories, filed.

September 27, 1973 Motion for Permission to Amend Complaint and Notice of Motion, filed by plaintiffs.

October 15, 1973 Plaintiffs' Motion for Permission to Amend Complaint, endorsed as follows: "Motion to amend granted absent objection; so ordered." Clarie, J.

November 16, 1973 Pre-Trial Order, entered. Defendants' counsel agreed to file within ten (10) days an answer to the plaintiffs' amended complaint; and to prepare a stipulation of facts on or before November 26, 1973; and to prepare a stipulation, as to alternative remedies, which the Court might consider, if the Court were to grant the plaintiffs' claims; and to file with the Court and with adversary counsel a memorandum of law, on or before Dec. 7, 1973. Clarie, J.

November 30, 1973 Stipulation of Facts, filed. Copies to 3 Judges.

December 14, 1973 Answer to Amended Complaint, filed. Copies to 3 Judges.

February 6, 1974 Supplemental Stipulation of Facts, filed. Copies to 3 Judges.

March 18, 1974 3-Judge Hearing. Letter 3/14/74 from Fitzpatrick filed. Requests withdrawal as a plaintiff. Court approves withdrawal as a named plaintiff from case, but not from class.*** Court concludes matter is statutory and therefore will issue order remanding case to single District Court Judge for disposition. Anderson, C.J.; Blumenfeld, D.J.; Clarie, D.J.

March 29, 1974 Order endorsed on Amendment to Complaint, as follows: "Permission to file granted ex parte". So ordered. Clarie, J.

March 29, 1974 Amendment to Complaint with consent of Defendants endorsed thereon filed.

April 11, 1974 Answer to Amended Complaint, filed.

April 17, 1974 Placed on trial list.

June 10, 1974 Memorandum of Decision, entered. The statutory claim for determination remanded to the single judge who convened the three-judge court. Anderson, C.J.; Blumenfeld, D.J.; Clarie, D.J.

June 21, 1974 Hearing on Civil Rights Action. Petitioner's Exhibits A and B filed. 1 Defendant's witness sworn and testified. Memorandum on background of Retirement fund filed by Atty Giber. Decision reserved. Supplemental Brief to be filed by Atty Orth on July 15; Attorney General to reply on July 22. All exhibits with Court. Court adjourned at 11:13 A.M. Clarie, J.

July 12, 1974 Supplemental Brief, filed by plaintiffs.

September 16, 1974 Memorandum of Decision, entered.**

The parties shall settle an appropriate order within ten (10) days. SO ORDERED. Clarie, J.

September 30, 1974 Letter requesting an extension of time to October 7, 1974 to settle on an appropriate order, filed by plaintiff. Order entered thereon approving same.

October 17, 1974 Order endorsed on Attorney Sidney Giber's letter request for extension of time, until October 21, 1974, for submission of proposed order, granting same.

October 31, 1974 Judgment entered. Clarie, J.

November 25, 1974 Notice of Appeal, filed by plaintiffs Donald Mathews and Mortimer Covert. Copies mailed to all counsel and to Clerk USCA with copy of Docket Entries.

November 25, 1974 Bond for Costs, filed.

December 11, 1974 Scheduling Order #1, filed.

2.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GARLAND M. FITZPATRICK, SAUL STEIN, WILLIAM SLOCUM, THOMAS H. ELLIOT, DONALD MATHEWS AND MORTIMER COVERT	
vs	Civil No. 15,492
J. FREDERICK BITZER, Chairman of the State Employees' Retirement Commission, ROBERT I. BERDON, Treasurer of the State of Connecticut, & NATHAN G. AGOSTINELLI, Comptroller of the State of Connecticut	

JUDGMENT

This action came on for hearing before the court, Honorable T. Emmet Clarie, Chief Judge, presiding, and the issues having been duly heard and findings of fact and conclusions of law having been filed and decision duly rendered.

It is Ordered and Adjudged that the defendant state officials and their successors are permanently enjoined from paying out monies from the State Employees Retirement Fund or state monies in respect to said fund, which discriminates against men on the basis of sex; that they are to administer the State Employees Retirement Act, so that men will be eligible to retire at age 50 and receive the same treatment as similarly situated women in all respects.

Without limiting the applicability or generality of the

foregoing, the following is ordered as of September 16, 1974:

(a) Each member who has completed twenty-five or more years of state service shall be retired, on his own application, or on the application of the executive head of the agency employing him, on the first day of the subsequent month named in the application on or after the member's fiftieth birthday;

(b) each member who has completed less than twenty-five years of state service shall be retired, on his own application on the first day of the month following his application, (1) if he has completed five years of state service and reached his sixty-fifth birthday, (2) or if he has completed ten years of state service and reached his fifty-fifth birthday, subject to adjustment in accordance with the rates of benefit table hereinafter referred to;

(c) each member referred to in a. and b. above shall receive a monthly retirement income beginning on his retirement date equal to one-twelfth of (A) plus (B): (A) The number of years of his state service, taken to completed months, multiplied by the applicable percentage of his Social Security earnings determined from the rates of benefit table hereinafter referred to for the appropriate age and years of state service; (B) The number of years multiplied by the applicable percentage of his excess earnings determined from such table for such age and years of service.

RATES OF BENEFIT TABLE

Age of Member on Retirement Date	Years of State Service	Percentage of Social Security Earnings	Excess Earnings
65 and over	5 and over*	1.25%	2.50%
60 to 65	10	1.00	2.00
59	10	.94	1.88
58	10	.88	1.76
57	10	.82	1.64
56	10	.76	1.52
55	10	.70	1.40
54	10	.65	1.30
53	10	.60	1.20
52	10	.56	1.12
51	10	.53	1.06
50	10	.50	1.00

* Not more than 20 years may be counted for this age and percentage group.

(d) A member whose state service is terminated because of economy, lack of work or abolition of his position, or who, being an army or air national guard technician in the military department, is dismissed by reason of separation from the national guard because of age, after he has completed twenty-five years of state service but before he has reached his fiftieth birthday shall be entitled to a retirement income. The amount of each monthly payment shall be determined from subsection (c) of Section 5-162, if the member elects the first day of the month on or after such birthday as his retirement date; and shall be the actuarial equivalent of such amount, as determined by the retirement commission, if the member elects the first day of the month on or after his termination date as his retirement date.

(e) A member who leaves state service before he is eligible for retirement but after completing at least ten years

of state service, of which at least five years shall have immediately preceded the date of his leaving state service, shall continue to be a member, and shall be eligible for a retirement income as provided in section 5-162, but on a reduced actuarial basis, as determined by the retirement commission, upon reaching his fiftieth birthday.

(f) The retirement allowances for male members on the retirement payroll as of September 16, 1974 and the supplementary payroll of October 9, 1974 (first pay for those approved as of September 1, 1974 and for prior approvals) shall be adjusted to the table below for the following categories:

1. Male voluntary retirees with less than 25 years service, retired prior to age 70.
2. Retirees under Section 5-163(c) Special Early Retirement.
3. Spouses of deceased male retirees in above categories where the spouse is receiving retirement allowances.
4. State police, correctional department guards and instructors with less than 25 years service, not receiving the benefits of section 5-173.

The adjustment for the current retirees is to include all cost of living adjustments allowed to place the male retirees on the same level of retirement allowances as for women in accordance with the schedule of early retirement contained in:

"Rates of Benefit (%) for Each Year of Service" as outlined in actuarial table below:

Years of Service	Age of Employee 50*	51*	52*	53*	54*	55*
5 to 9	0	0	0	0	0	0
10	1.00	1.06	1.12	1.20	1.30	1.40
11	1.07	1.12	1.18	1.25	1.35	1.44
12	1.13	1.18	1.24	1.31	1.39	1.48
13	1.20	1.25	1.29	1.36	1.44	1.52
14	1.26	1.31	1.35	1.41	1.48	1.56
15	1.33	1.37	1.41	1.47	1.53	1.60
16	1.40	1.43	1.47	1.52	1.58	1.64
17	1.46	1.49	1.53	1.57	1.62	1.68
18	1.53	1.56	1.58	1.62	1.67	1.72
19	1.59	1.62	1.64	1.68	1.71	1.76
20	1.66	1.68	1.70	1.73	1.76	1.80
21	1.73	1.74	1.76	1.78	1.81	1.84
22	1.79	1.80	1.82	1.84	1.85	1.88
23	1.86	1.87	1.87	1.89	1.90	1.92
24	1.93	1.93	1.93	1.94	1.94	1.96
25 or over	2.00	2.00	2.00	2.00	2.00	2.00

Years of Service	Age of Employee 56	57	58	59	60-64	65 & over
5 to 9	0	0	0	0	0	2.50
10	1.52	1.64	1.76	1.88	2.00	2.50
11	1.55	1.66	1.78	1.89	2.00	2.50
12	1.58	1.69	1.79	1.90	2.00	2.50
13	1.62	1.71	1.81	1.90	2.00	2.50
14	1.65	1.74	1.82	1.91	2.00	2.50
15	1.68	1.76	1.84	1.92	2.00	2.50
16	1.71	1.78	1.86	1.93	2.00	2.50
17	1.74	1.81	1.87	1.94	2.00	2.50
18	1.78	1.83	1.89	1.94	2.00	2.50
19	1.81	1.86	1.90	1.95	2.00	2.50
20	1.84	1.88	1.92	1.96	2.00	2.50
21	1.87	1.90	1.94	1.97	2.00	**
22	1.90	1.93	1.95	1.98	2.00	**
23	1.94	1.95	1.97	1.98	2.00	**
24	1.97	1.98	1.98	1.99	2.00	**
25 or over	2.00	2.00	2.00	2.00	2.00	2.00

* There must be at least 10 years actual full-time state service.

** Use 2.50% for 20 years.

The defendants and their successors shall recalculate, as of September 16, 1974, in accordance with the foregoing, the payments and benefits due each retired male member of the retirement system and make such payments as soon as is reasonable and feasible.

Nothing herein shall be construed to interfere with the State Legislature performing its constitutional functions of freely determining public policy, as it pertains to deciding upon a uniform retirement age for all men and women employees of the State of Connecticut in the future, provided the same is carried out without discrimination as to age or benefits on the basis of sex.

Dated at Hartford, Connecticut this 31st day of October, 1974.

3.

CONNECTICUT CONSTITUTION

Article I, Section 20

No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political rights because of religion, race, color, ancestry, national origin or sex.

CONNECTICUT GENERAL STATUTES

§4-61c. Guarantee of equal employment practices by state agencies

(a) State officials and supervisory personnel shall recruit, appoint, assign, train, evaluate and promote state personnel on the basis of merit and qualifications, without regard for race, color, religious creed, sex, age, national origin, ancestry or physical disability, including but not limited to, blindness unless it is shown by such state officials or supervisory personnel that such disability prevents performance of the work involved.

(b) All state agencies shall promulgate written directives to carry out this policy and to guarantee equal employment opportunities at all levels of state government. They shall regularly review their personnel practices to assure compliance. They shall conduct continuing orientation and training programs with emphasis on human relations and fair employment practices. The state personnel commissioner shall insure that the entire examination process, including qualifications appraisal, is free from bias.

(c) Appointing authorities shall exercise care to insure utilization of minority group persons.

§4-61d. Activities of state agencies to be performed without discrimination. State contracts

(a) All services of every state agency shall be performed without discrimination based upon race, color, religious creed, sex, age, national origin, ancestry or physical disability, including, but not limited to, blindness. No state facility shall be used in the furtherance of any discriminatory practice, nor shall any state agency become a party to any agreement, arrangement or plan which has the effect of sanctioning discriminatory practices. Each state agency shall analyze all of its operations to ascertain possible instances of noncompliance with the policy of sections 4-61c to 4-61l, inclusive, and shall initiate comprehensive programs to remedy any defect found to exist.

(b) Every state contract or subcontract for construction on public buildings or for other public work or for goods and services shall conform to the intent of section 4-114a of the general statutes.

§4-61e. Discrimination in job placement by state agencies prohibited

(a) All state agencies, including educational

institutions, which provide employment referrals or placement services to public or private employers, shall accept job orders on a fair practice basis. Any job request indicating an intention to exclude any person because of race, color, religious creed, sex, age, national origin, ancestry, or physical disability, including, but not limited to, blindness shall be rejected, unless it is shown by such public or private employers that such disability prevents performance of the work involved.

(b) All state agencies shall cooperate in programs developed by the commission on human rights and opportunities initiated for the purpose of broadening the base for job recruitment and shall further cooperate with all employers and unions providing such programs.

(c) The department of labor shall encourage and enforce employers and labor unions, to comply with the policy of sections 4-61c to 4-61l, inclusive, and promote equal employment opportunities.

§ 4-61f. Discrimination in state licensing and charter procedures prohibited

No state department, board or agency shall grant, deny or revoke the license or charter of any person on the grounds of race, color, religious creed, sex, age, national origin, ancestry, or physical disability including, but not limited to, blindness, unless it is shown by such state department, board or agency that such disability prevents performance of the work involved. Each state agency shall take such appropriate action in the exercise of its licensing or regulatory power as will assure equal treatment of all persons and eliminate discrimination and enforce compliance with the policy of sections 4-61c to 4-61l, inclusive.

§ 4-61g. State agencies not to permit violation of public accommodations act

No state department, board or agency shall permit any

violation of the public accommodations act.

§ 4-61h. Educational and vocational programs to be conducted without discrimination

All educational, counseling, and vocational guidance programs and all apprenticeship and on-the-job training programs of state agencies, or in which state agencies participate, shall be open to all qualified persons, without regard to race, color, religious creed, sex, age, national origin, ancestry, or physical disability, including, but not limited to, blindness. Such programs shall be conducted to encourage the fullest development of the interests, aptitudes, skills, and capacities of all students and trainees, with special attention to the problems of culturally deprived, educationally handicapped, economically disadvantaged, or physically disabled, including, but not limited to, blind persons. Expansion of training opportunities under these programs shall be encouraged to provide involving larger numbers of participants from those segments of the labor force where the need for upgrading levels of skill is greatest.

§ 4-61i. Discrimination prohibited in allocation of state benefits

Race, color, religious creed, sex, age, national origin, ancestry, or physical disability, including, but not limited to, blindness shall not be considered as limiting factors in state-administered programs involving the distribution of funds to qualify applicants for benefits authorized by law; nor shall state agencies provide grants, loans or other financial assistance to public agencies, private institutions or organizations which engage in discriminatory practices.

§ 4-61j. Cooperation with commission on human rights and opportunities by state agencies

All state agencies shall cooperate with the commission on human rights and opportunities in their enforcement and educational programs. They shall comply with the

commission's request for information concerning practices inconsistent with the state policy against discrimination and shall consider its recommendations for effectuating and implementing that policy. The commission on human rights and opportunities shall continue to augment its enforcement and education programs which seek to eliminate all discrimination.

§31-122. Definitions

When used in this chapter,

(b) "person" means one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers and the state and all political subdivisions and agencies thereof;

(f) "employer" includes the state and all political subdivisions thereof and means any person or employer with three or more persons in his employ.

§31-126. Unfair employment practices

It shall be an unfair employment practice

(a) for an employer, by himself or his agent, except in the case of a bona fide occupational qualification or need, because of the race, color, religious creed, age, sex, national origin, ancestry, or physical disability, including, but not limited to, blindness of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against him in compensation or in terms, conditions or privileges of employment;

(b) for any employment agency, except in the case of a bona fide occupational qualification or need, to fail or refuse to classify properly or refer for employment, or otherwise to discriminate against, any individual because of his race, color, religious creed, age, sex, national origin, ancestry, or physical disability, including, but not limited to, blindness;

(c) for a labor organization, because of the race, color, religious creed, age, sex, national origin, ancestry, or physical disability, including, but not limited to, blindness of any individual to exclude from full membership rights or to expel from its membership such individual or to discriminate in any way against any of its members or against any employer or any individual employed by an employer, unless such action is based on a bona fide occupational qualification;

(d) for any person, employer, labor organization or employment agency to discharge, expel or otherwise discriminate against any person because he has opposed any unfair employment practice or because he has filed a complaint or testified or assisted in any proceeding under section 31-127;

(e) for any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts herein declared to be unfair employment practices or to attempt to do so;

(f) for any employer, employment agency, labor organization or person, except in the case of a bona fide occupational qualification or need, to advertise employment opportunities in such a manner as to restrict such employment so as to discriminate against individuals because of their race, color, religious creed, age, sex, national origin, ancestry, or physical disability, including, but not limited to, blindness.

(g) for an employer, by himself or his agent,

(i) to terminate a woman's employment because of her pregnancy or

(ii) to refuse to grant to said employee a reasonable leave of absence for disability resulting from such pregnancy or

(iii) to deny to said employee, who is disabled as a result of pregnancy, any compensation to which she is entitled as a result of the accumulation of disability or leave benefits accrued pursuant to plans maintained by said employer. Upon signifying her intent to return, such employee shall be reinstated to her original job or to an equivalent position with equivalent pay and accumulated seniority, retirement, fringe benefits and other service credits unless, in the case of a private employer, the employer's circumstances have so changed as to make it impossible or unreasonable to do so.

The provisions of this section as to age shall not apply to

(1) termination of employment where the employee is thereupon entitled to benefits under the terms or conditions of any bona fide retirement or pension plan or collective bargaining agreement between the employer and a bona fide labor organization,

(2) operation of the terms or conditions of any bona fide retirement or pension plan,

(3) operation of the terms or conditions of any bona fide group or employee insurance plan or

(4) operation of any bona fide apprenticeship system or plan.

§31-127. Procedure

Any person claiming to be aggrieved by an alleged unfair employment practice may, by himself or his attorney, make, sign and file with the commission a complaint in writing under oath, which shall state the name and address of the person, employer, labor organization or employment agency alleged to have committed the unfair employment practice, and which shall set forth the particulars thereof and contain such other information as may be required by

the commission. The commission, whenever it has reason to believe that any person has been engaged or is engaged in an unfair employment practice, may issue a complaint. Any employer whose employees, or any of them, refuse or threaten to refuse to comply with the provisions of this chapter may file with the commission a written complaint under oath asking for assistance by conciliation or other remedial action. After the filing of any complaint, the chairman of the commission shall refer the same to a commissioner or investigator to make prompt preliminary investigation of such complaint and, if such commissioner or investigator determines after such preliminary investigation that there is reasonable cause for believing that an unfair employment practice has been or is being committed as alleged in such complaint he shall immediately endeavor to eliminate the unfair employment practice complained of by conference, conciliation and persuasion. In the conduct of such investigation the commission may issue subpoenas requiring the production of employment records relating to the complaint under investigation. No commissioner or investigator shall disclose what has occurred in the course of such endeavors, provided the commission may publish the facts in the case and any complaint which has been dismissed and the terms of conciliation when a complaint has been adjusted. In case of failure to eliminate such practice, the investigator or investigating commissioner shall certify the complaint and the results of his investigation to the chairman of the commission and to the attorney general. The chairman of the commission shall thereupon appoint a hearing tribunal of one member of the commission or one hearing examiner to hear such complaint and shall cause to be issued and served in the name of the commission a written notice, together with a copy of such complaint, as the same may have been amended, requiring the person, employer, labor organization or employment agency named in such complaint, hereinafter referred to as the respondent, to answer the charges of such complaint at a hearing before such tribunal, at a time and place to be specified in such notice. The place of any such hearing may

be the office of the commission or another place designated by it. The case in support of the complaint shall be presented at the hearing by the attorney general, who shall be counsel for the commission, or the counsel appointed under the provisions of section 31-125a, as the case may be; and no commissioner who previously made the investigation or caused the notice to be issued shall participate in the hearing except as a witness, nor shall he participate in the deliberations of the tribunal in such case. Any endeavors or negotiations for conciliation shall not be received in evidence. The respondent may file a written answer to the complaint and appear at such hearing in person or otherwise, with or without counsel, and submit testimony and be fully heard. The tribunal conducting any hearing may permit reasonable amendment to any complaint or answer and the testimony taken at such hearing shall be under oath and be transcribed at the request of any party. If, upon all the evidence, the tribunal finds that a respondent has engaged in any unfair employment practice, it shall state its findings of fact and shall issue and file with the commission and cause to be served on such respondent an order requiring such respondent to cease and desist from such unfair employment practice and further requiring such respondent to take such affirmative action, including, but not limited to, hiring or reinstatement of employees, with or without back pay, or restoration to membership in any respondent labor organization, as in the judgment of the tribunal will effectuate the purpose of this chapter. If, upon all the evidence, the tribunal finds that the respondent has not engaged in any alleged unfair employment practice, it shall state its findings of fact and shall similarly issue and file an order dismissing the complaint. The commission shall establish rules of practice to govern, expedite and effectuate the foregoing procedure. Any complaint filed pursuant to this section must be so filed within ninety days after the alleged act of discrimination.

§53-35. Discrimination in public accommodations, rental housing and commercial property, sale of building lots, mobile home parks

(a) All persons within the jurisdiction of this state shall be entitled to full and equal accommodations in every place of public accommodation, resort or amusement, subject only to the conditions and limitations established by law and applicable alike to all persons; and any denial of such accommodation by reason of race, creed, color, national origin, ancestry, or sex, or physical disability, including, but not limited to, blindness of the applicant therefor shall be a violation of the provisions of this section. Any discrimination, segregation or separation, on account of race, creed, color, national origin, ancestry or sex or physical disability, including, but not limited to, blindness shall be a violation of this section. A place of public accommodation, resort or amusement within the meaning of this section means any establishment, which caters or offers its services or facilities or goods to the general public including, but not limited to, public housing projects and all other forms of publicly assisted housing, and further including any housing accommodation, commercial property or building lot, on which it is intended that a housing accommodation or commercial building will be constructed, offered for sale or rent, and mobile home parks as defined in section 1 of number 186 of the public acts of 1972, provided the provisions of this section shall not apply (1) to the rental of a housing accommodation in a building which contains housing accommodations for not more than two families living independently of each other, if the owner or members of his family reside in one of such housing accommodations, or (2) to the rental of a room or rooms in a housing accommodation, if such rental is by the occupant of the housing accommodation, or by the owner of the housing accommodation and he or members of his family reside in such housing accommodation. The provisions of this section, with respect to the prohibition of sex discrimination, shall not apply to the rental of sleeping

accommodations provided by associations and organizations which rent all such sleeping accommodations on a temporary or permanent basis for the exclusive use of persons of the same sex.

(b) Nothing in this section shall require any person to modify his property in any way or provide a higher degree of care for a physically disabled person, including, but not limited to blind persons, than for a person not physically disabled.

(c) Any blind person shall be entitled to full and equal access to all places of public accommodation, resort or amusement as defined by this section, accompanied by his guide dog, and he may keep such dog with him at all times in such place of public accommodation, resort or amusement at no extra charge: provided, such dog shall be in the direct custody of such blind person and shall be wearing a harness. Such blind person shall be liable for any damage done to the premises or facilities by such dog.

(d) Any person who violates any provision of this section shall be fined not less than twenty-five nor more than one-hundred dollars or imprisoned not more than thirty days or both.

(e) This section shall not apply to proceedings pending before the civil rights commission or in any court on October 1, 1963.

§ 53-35a. Discrimination in associations of professional or other licensed persons

Any association, board or other organization the principal purpose of which is the furtherance of the professional or occupational interests of its members, whose profession, trade or occupation requires a state license, which refuses to accept a person as a member of such association, board or organization because of his race, national origin, creed, sex or color shall be fined not less

than one hundred dollars nor more than five hundred dollars.

4.

§ 5-156. Retirement fund

All member contributions and state appropriations shall be held in a separate retirement fund by the treasurer, who may invest and reinvest as much of the fund as is not required for current disbursements in accordance with the law governing the investment of trust funds as defined in section 45-88.

§ 5-156a. Funding of retirement system on actuarial reserve basis

(a) The state employees' retirement system shall be funded on an actuarial reserve basis. The retirement commission shall, on or before March first, annually certify to the general assembly the amount necessary on the basis of an actuarial determination to gradually establish and subsequently maintain the retirement fund on such determined actuarial reserve basis, and make such other recommendations with regard to such fund and its administration as the commission deems appropriate. The retirement commission shall, at least once every three years, prepare a valuation of the assets and liabilities of the system. On the basis of each such valuation, it shall redetermine the normal rate of contribution and, until it is amortized, the unfunded past service liability. The general assembly shall review the commission's recommendations and certification and shall appropriate to the retirement fund the amount certified by the retirement commission as necessary provided said certification is in compliance with this section.

(b) The retirement commission shall determine on an actuarial basis (1) a normal rate of contribution which the state shall be required to make into the retirement fund in order to meet the actuarial cost of current service and (2) the unfunded past service liability. For the first fifteen

years, the funding program for the actuarial reserve basis shall consist of the following percentages of the sum of normal cost and the amount required for a forty-year amortization of unfunded liabilities:

Fiscal Year		Percentage to be paid of normal cost plus full 40-year amortization from the beginning of such fiscal year
Beginning	7-1-71	30%
"	7-1-72	35%
"	7-1-73	40%
"	7-1-74	45%
"	7-1-75	50%
"	7-1-76	55%
"	7-1-77	60%
"	7-1-78	65%
"	7-1-79	70%
"	7-1-80	75%
"	7-1-81	80%
"	7-1-82	85%
"	7-1-83	90%
"	7-1-84	95%
"	7-1-85	100%

provided the state payments shall not be less than seventy-five per cent of the total retirement income payments for each fiscal year commencing July 1, 1973; and for each of the fiscal years ending June 30, 1972, and June 30, 1973, respectively, shall be seventy per cent of the total retirement income payments.

(c) Transfer of appropriated amounts from the general fund and the applicable special funds to the retirement fund shall be made in equal monthly payments during the fiscal year.

(d) No act liberalizing the benefits of the plan shall be

enacted by the general assembly until the assembly has requested and received from the retirement commission a certification of the cost of such change under the actuarial funding basis adopted by section 5-154 and this section using full normal cost plus forty-year amortization.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-251

GARLAND M. FITZPATRICK, ET AL.,
DONALD MATTHEWS, ET AL.
Plaintiffs
Petitioners

v.

FREDERICK BITZER, CHAIRMAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

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OCTOBER TERM, 1975

No. 75-251

GARLAND M. FITZPATRICK, ET AL.,
DONALD MATTHEWS, ET AL.
Plaintiffs,
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v.

FREDERICK BITZER, CHAIRMAN, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions below are as set forth in the petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

Whether in a suit under Title VII of the Civil Rights Act of 1964 by private individuals, who are retired state employees, against state officials, in their official capacity,

the Eleventh Amendment bars an award by a federal court of back retirement pay covering periods prior to the date of judgment, which must be paid with state funds.

CONSTITUTIONAL and STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions should be considered, in addition to those listed in the petition:

Conn. Gen. Stat., § 5-156:

> Retirement fund. All member contributions and state appropriations shall be held in a separate retirement fund by the treasurer, who may invest and reinvest as much of the fund as is not required for current disbursements in accordance with the law governing the investment of trust funds as defined in section 45-88.

Constitution of Connecticut, Article Eleventh, Section 4:

> Claims against the state shall be resolved in such manner as may be provided by law.

STATEMENT OF THE CASE

The statement set forth in the petition is adequate.

ARGUMENT

1. The Decision Below is Clearly Correct.

The petitioners had contended that the recalculated benefits sought by them would not be paid out of the public funds in the state treasury nor by the defendants out of their personal funds, but would be paid out of the retirement fund. The petitioners later amended their complaint to seek

an award from "the retirement fund and/or state moneys." The United States Court of Appeals for the Second Circuit found that the State Employees' Retirement Fund in Connecticut is composed of contributions by both the employees and the state. The court found that the state is required to appropriate funds on an actuarial basis and to pay at least 75% of the total retirement income payments for each year. Conn. Gen. Stat., § 5-156a. Thus, while the fund is referred to in Conn. Gen. Stat., § 5-156 as "a separate retirement fund" the court correctly concluded that the State Employees' Retirement Fund was an "alter ego" of the state and shares the state's Eleventh Amendment immunity. In determining whether an entity or agency is a state entity or agency for purposes of the Eleventh Amendment, a court must consider many factors, such as: If the plaintiff prevails, will judgment have to be paid out of the state treasury. *Whitten* v. *State University Const. Fund*, 493 F.2d 177, 180 (1st Cir. 1974). Further factors to be considered in determining whether or not Eleventh Amendment immunity is present are:

a. has the entity been separately incorporated;

b. is it performing governmental or proprietary functions;

c. does it have the power to sue and be sued and to enter into contracts;

d. has the state immunized itself from responsibility for the agency operations; and

e. the degree of autonomy over its own operations exercised by the entity.

See *Whitten* v. *State University Const. Fund*, 493 F.2d at 179-80; *Gordenstein* v. *University of Delaware*, 381 F. Supp. 718; *Krisel* v. *Duran*, 258 F. Supp. 845 (S.D.N.Y. 1966), aff'd.

per curiam 386 F.2d 179 (2d Cir. 1967), cert. denied 390 U.S. 1042 (1968). From the foregoing it is evident that the court correctly concluded that the State Employees' Retirement Fund shares the Eleventh Amendment shield.

2. There is No Important Question of Federal Law.

The petitioner alleges that the question of whether the Eleventh Amendment has been limited by enactment of the Fourteenth Amendment has been left unanswered. The court below relying upon *Edelman* v. *Jordan*, 415 U.S. 651 (1974) disposed of the petitioners' contention *Edelman* did not answer the question, by opining:

> "Thus there is no reason in this case to depart from the balance between the Eleventh Amendment and other constitutional interests which was most recently reaffirmed in *Edelman*. In any event it may not still be open to this court to accept plaintiffs' invitation to disregard the Eleventh Amendment in Fourteenth Amendment cases. While Justice Marshall's dissent in *Edelman* suggested that the Supreme Court had not decided whether the Eleventh Amendment is limited by the later enactment of the Fourteenth, 415 U.S. at 694 n. 2, the majority in that case expressly overruled *Shapiro* v. *Thompson*, 394 U.S. 618 (1969), *State Department of Health and Rehabilitative Services* v. *Zarate*, 407 U.S. 918 (1972) (per curiam), and *Wyman* v. *Bowens*, 397 U.S. 49 (1970) (per curiam), all cases involving Fourteenth Amendment causes of action, insofar as those cases allowed assessment of retroactive damages against the state. 415 U.S. at 670-71. See also *Wilkerson* v. *Meskill*, 501 F.2d 297 (2d Cir. 1974), in which this court affirmed *per curiam* on the basis of *Edelman* a dismissal of plaintiff's claims to back wages from the state based on equal protection and due process, although without considering the arguments presented here. Further see *Skehan* v. *Board of Trustees*, 501 F.2d 31, 42 n. 7 (3d Cir. 1974); *Burton* v. *Waller*, 502 F.2d 1261, 1273 (5th Cir. 1974), *cert. denied*, 43 U.S.L.W. 3474 (U.S. No. 74-875 Mar. 4, 1975)."

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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November 6, 1975

Nos. 75-251 and 75-283

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In the Supreme Court of the United States

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v.

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v.

DONALD MATTHEWS, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-251

GARLAND M. FITZPATRICK, ET AL., PETITIONERS

v.

FREDERICK BITZER, ET AL.

No. 75-283

FREDERICK BITZER, ET AL., PETITIONERS

v.

DONALD MATTHEWS, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

The United States has equal employment opportunity enforcement responsibility under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, *et seq.*, as amended, 42 U.S.C. 2000e, *et seq.* In particular, the Attorney General has authority under Sections 706(f) and 707 of the Act, 42 U.S.C. (Supp. III) 2000e-5(f) and 2000e-6, to bring civil actions against state and local governments and governmental agencies which have allegedly engaged in unlawful employment practices. The decision of the court of appeals, insofar as it held that awards of retroactive benefits against state governments, in suits by private individuals, are barred by the Eleventh Amendment, will substantially affect the Attorney General's enforcement responsibilities.

QUESTIONS PRESENTED

1. Whether, in a suit under Title VII of the Civil Rights Act of 1964 by private individuals against state officials, the Eleventh Amendment bars an award of retroactive benefits to compensate the victims of unlawful employment practices for the financial injury suffered by them.

2. Whether, if the private plaintiffs prevail in such a suit, the Eleventh Amendment bars an award to them of reasonable attorneys' fees as a part of the costs.

STATEMENT

Petitioners,[1] male present and former employees of the State of Connecticut, brought this action in the United States District Court for the District of Connecticut, alleging that the state's statutory scheme for the retirement of its employees discriminated against men on account of their sex. The district court held that the state's retirement plan violates Title VII's prohibition against discrimination in employment on account of sex (Cross-Pet. App. 2a-25a). The court enjoined the state officials (cross-petitioners here) from continuing to operate the state's retirement scheme in a sexually discriminatory manner (*id.* at 24a), but it denied petitioners' requests for an award of retroactive retirement benefits, to compensate them for financial losses suffered as a result of the state's discriminatory practices, and for an award of reasonable attorneys' fees as a part of the costs (*id.* at 20a-23a). The court reasoned that, although the statute expressly authorizes both the monetary relief requested and awards of attorneys' fees (42 U.S.C. (Supp. III) 2000e-5(g) and 42 U.S.C. 2000e-5(k)), the Eleventh Amendment, as interpreted by this Court in *Edelman* v. *Jordan*, 415 U.S. 651, and other cases, "remains a jurisdictional barrier to the payment of the retroactive monetary relief

---

[1] For convenience, we refer to the petitioners in No. 75-251 —the plaintiffs below—as "petitioners," and to the respondents in No. 75-251 as "cross-petitioners." References to the "petition" are to the petition filed in No. 75-251, and references to the "cross-petition" are to the petition filed in No. 75-283.

requested * * * [and] precludes the award of attorneys' fees" (Cross-Pet. App. 23a).

On petitioners' appeal,[2] the court of appeals affirmed in part and reversed and remanded in part (Pet. App. 1a-24a). It held that, although Congress intended to authorize the district courts to award back pay or other retroactive monetary relief against states in actions brought by private individuals under Title VII (*id.* at 14a-17a), such relief is barred by the Eleventh Amendment (*id.* at 17a-23a). The court ruled that the power of Congress to enforce the Fourteenth Amendment does not include the power to subject the states to "a private federal action for retroactive damages" (*id.* at 19a), at least when "Congress * * * has at its disposal various methods other than private federal damage suits for enforcing Fourteenth Amendment rights" (*id.* at 20a).

DISCUSSION

The petition and the cross-petition present important constitutional questions that should be resolved by this Court.

1. The availability in private actions of back pay or other monetary relief designed to compensate the victims of unlawful employment discrimination for the financial injury they suffered as a consequence of the discrimination is a crucial element of Title VII's remedial scheme. As this Court stated in *Albemarle Paper Co.* v. *Moody*, No. 74-389, decided June

[2] The state officials did not appeal.

25, 1975, "[i]f employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality" (slip op. 11). Moreover, "the private right of action remains an essential means of obtaining judicial enforcement of Title VII" (*Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 45).

The holding of the court of appeals that states are insulated from such monetary relief at the instance of private plaintiffs would significantly affect the Act's enforcement scheme and would undermine "[t]he 'make whole' purpose of Title VII" (*Albemarle Paper Co.* v. *Moody*, *supra*, slip op. 12). In our view, that holding is incorrect. Having empowered Congress by the Fourteenth Amendment to enforce the provisions of that Amendment by appropriate means, "the States necessarily surrendered any portion of their sovereignty that would stand in the way" of such enforcement. *Parden* v. *Terminal Railway*, 377 U.S. 184, 192.[3]

2. The attorneys' fee issue presented by the cross-petition was, in our view, decided correctly by the court of appeals. Section 706(k) of the Act expressly authorizes the district courts to "allow the prevailing party * * * a reasonable attorney's fee as part of

[3] The Court was not presented in *Edelman* v. *Jordan*, 415 U.S. 651, with the question "whether the States' Eleventh Amendment sovereign immunity may have been limited by the later enactment of the Fourteenth Amendment to the extent that such a limitation is necessary to effectuate the purposes of that Amendment" (415 U.S. at 694, n. 2, dissenting opinion of Mr. Justice Marshall).

the costs * * *." Indeed, in order to vindicate the "strong public interest in having injunctive actions brought under Title VII, to eradicate discriminatory employment practices" (*Albemarle Paper Co.* v. *Moody, supra,* slip op. 8), attorneys' fees should be awarded to the prevailing party except in "special circumstances" when such an award would be inappropriate or unnecessary. See *ibid.*; cf. *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400.[4]

Even if it is assumed that monetary relief against the state officials in this case is precluded by the Eleventh Amendment, an award of attorneys' fees incident to the prospective injunctive relief ordered by the district court would have only an ancillary impact on the state treasury and would not offend the Eleventh Amendment. Such an award is not "measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials" (*Edelman* v. *Jordan, supra,* 415 U.S. at 668) but is a permissible consequence of the litigation itself. Cf. *Fairmont Creamery Co.* v. *Minnesota,* 275 U.S. 70, 74-75.

As this Court recognized in *Alyeska Pipeline, supra,* 421 U.S. at 269-270, n. 44, and as the court of appeals in this case acknowledged (Pet. App. 24a), the courts of appeals are divided on the question

[4] This is an instance in which "Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation" (*Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240, 263).

whether an award of attorneys' fees against state officials is permissible under the Eleventh Amendment. Because of the importance of that question to the enforcement of Title VII, and because of its close relationship to the monetary relief question presented by the petition, we believe that the cross-petition should also be granted.

CONCLUSION

The petition and the cross-petition for a writ of certiorari should be granted.

Respectfully submitted.

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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-251

Garland M. Fitzpatrick, et al.,
Donald Matthews, et al., *Plaintiffs Petitioners*

v.

Frederick Bitzer, Chairman, et al., *Respondents*

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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-251

Garland M. Fitzpatrick, et al.,
Donald Matthews, et al., *Plaintiffs Petitioners*

v.

Frederick Bitzer, Chairman, et al., *Respondents*

BRIEF FOR PETITIONERS

Opinions Below

The opinion of the Court of Appeals of June 2, 1975 is reported at 519 F.2d 559. The opinion of the District Court of September 16, 1974 is reported in 390 F. Supp. 278 (D. Conn. 1974). Both opinions were printed in the appendix of respondent Bitzer in his Petition for Writ of Certiorari in No. 75-283 (hereafter App. as distinguished from the Appendix, hereafter A).

Jurisdiction

The judgment of the Court of Appeals was entered on June 2, 1975. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Article 1, Section 8, Clause 3 to the Constitution provides that the Congress shall have the Power... "To regulate Commerce...among the several States..."

Title VII of the Civil Rights Act of 1964, (Pub. L. 88-352 §701, 78 Stat. 253) as amended by the Equal Employment Opportunity Act of 1972 *(in italics,* Pub. L. 92-261, §2, 86 Stat. 103), in 42 U.S.C. §2000e, *et seq.*, provides in part as follows:

> For the purposes of this subchapter–
>
> (a) The term "person" includes one or more

> individuals, *governments, governmental agencies, political subdivisions,* labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.
>
> (b) The term "employer" means a person engaged in an industry affecting commerce who has *fifteen* or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or *any department or agency of the District of Columbia subject by statute to procedures of the competitive service (as defined in section 2102 of Title 5),* or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26, *except that during the first year after March 24, 1972,* persons having fewer than *twenty-five* employees (and their agents) shall not be considered *employers.*
>
> . . .
>
> (f) The term "employee" means an individual employed by an employer, *except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision.*
>
> . . .

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959, *and further includes any governmental industry, business, or activity.*

42 U.S.C. §2000e-2

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees *or applicants for employment* in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

. . .

42 U.S.C. §2000e-5

. . .

(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d) of this section, the Commission has been unable *to secure from the respondent a conciliation agreement*

acceptable to the Commission, the Commission *may bring a civil action against any respondent not a government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against such respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may* be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for

such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit *the Commission, or* the Attorney General *in a case involving a government, governmental agency, or political subdivision,* to intervene in such civil action *upon certification* that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsections *(c) or (d) of this section or further* efforts of the Commission to obtain voluntary compliance.

(2) Whenever a charge is filed with the Commission and the Commission concludes on the *basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited.*

(3) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are

maintained and administered, or in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), *or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission.* Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex, or national origin or in violation of section 2000e-3(a) of this title.

. . .

(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

Question Presented

Does the Eleventh Amendment prohibit a federal court from awarding back pay monetary relief against a state, in favor of employees of that state who established that they were victims of discriminatory state laws which violated Title VII of the 1964 Civil Rights Act as amended in 1972?

Statement of the Case

This suit was brought as a class action on behalf of all present and retired male employees to enjoin as violative of the 14th Amendment and the Civil Rights Act of 1871 the sexually discriminatory provisions of the Connecticut State Employees Retirement Act. After a three-judge court was convened, the complaint was amended to allege that the Retirement Act violated Title VII of the Civil Rights Act of 1964 as amended in March 1972 to include states, and so the court remanded the case to the single district judge who convened it, to consider the applicability of federal statutory law. Jurisdiction of this suit existed under 28 U.S.C. §§ 1331, 1343(3) and (4), 2201, 2202, 2281 and 42 U.S.C. § 2000e-5(f)(3). On mainly stipulated facts, the District Court found that the Retirement Act essentially granted to women employees having 25 or more years of service the right to retire five years earlier than similarly situated men and further that there were rate benefit differentials in favor of female over male employees with less than 25 years of state service. It held that this constituted an unlawful employment practice by Connecticut

because it discriminated between men and women in regard to fringe benefits and consequently violated Title VII and regulations thereunder. The District Court granted plaintiffs prospective injunctive relief and ordered defendant state officials and their successors to administer the Act without unreasonable sex classifications unfavorable to men. (App. 2a, 24a)

Plaintiffs, however, also sought monetary damages in the form of recalculated benefits for retired males retroactive to various points in time, the earliest in 1965, as necessary to give them complete relief. They further sought an allowance for reasonable fees for their attorneys, and the District Court found fees totaling $6,275 were fair and reasonable. The District Court held that monetary and attorneys' fees awards against the state were precluded by the Eleventh Amendment and *Edelman v. Jordan, infra,* since any recovery would come from the public treasury. (App. 22a-23a)

Two retired male plaintiffs (the petitioners here) who had been receiving lower benefits than comparable females appealed the decision of the District Court to the United States Court of Appeals for the Second Circuit. Respondent state officials did not cross-appeal the basic decision striking down the sexually discriminatory provisions of the retirement laws. The Court of Appeals affirmed the District Court's refusal to award back pay, but reversed on the question of attorneys' fees. (App. 26a, 31a) It held that the Eleventh Amendment and this Court's decision in *Edelman v. Jordan* precluded an award of back pay by a federal court against a state, even though it said that Congress had intended to make that remedy available against the states under the Equal Employment Opportunity Act of 1972. (App. 39a-41a) It also held, however, that an award of attorneys' fees to the successful plaintiffs was not barred by the Eleventh Amendment. Each side timely filed a petition

for a writ of certiorari to review the holding adverse to it. This Court granted both petitions on Dec. 15, 1975, and consolidated the cases.

Summary of Argument

As this Court indicated in *Edelman v. Jordan,* 415 U.S. 651, *reh. denied,* 416 U.S. 1000 (1974), the threshold inquiry in this case is whether Congress has clearly indicated its intention to subject the several States to the full range of remedies available under Title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972. Both the language of the 1972 amendments and their legislative history manifest the requisite intent. The literal language of the amendments compels such conclusion. Moreover, the legislative history is replete with references to the extension to state and local government employees of the remedies available to private sector employees under Title VII.

The Equal Employment Opportunity Act of 1972 is predicated upon Congressional power both under the Commerce Clause and under Section 5 of the Fourteenth Amendment. Early in this Court's history, in *McCulloch v. Maryland,* 4 Wheat. 316, 421 (1819), Chief Justice Marshall established the parameters of the exercise of that power:

> "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

Recent decisions of this Court teach that legislation directed at discrimination is within the scope of Congressional power under both the Commerce Clause and the Fourteenth Amendment and is plainly adapted to a legitimate end. Congress found widespread evidence of both intentional and

systemic discrimination in employment by state and local governments. The Act was an appropriate means of eliminating that discrimination, and is consistent, not only with power under the Commerce Clause, but particularly with the equal protection principles embodied in the Fourteenth Amendment.

The Fourteenth Amendment must be read as abrogating, *pro tanto,* the concept of state sovereignty embodied in the Eleventh Amendment, not only because the Fourteenth Amendment is later in time, but also because, in the limited area prescribed by that amendment, the states have no authority the exercise of which can or should be protected from litigation. Both framers and opponents of the Fourteenth Amendment, as well as the Thirteenth and Fifteenth Amendments and the contemporaneous implementing legislation, clearly understood that the principles therein embodied were antithetical to state sovereignty. Recent history had demonstrated that some of the premises underlying state sovereignty, and the Eleventh Amendment, were inaccurate. The states, as sovereigns, could not always be relied upon to "do right". Congress was therefore empowered under, *inter alia,* Section 5 of the Fourteenth Amendment to enact appropriate remedial legislation. It was under such legislation that this case arose, and that expressly provides for the equitable remedy petitioners seek.

Even assuming, *arguendo,* that, in addition to the exercise of Congressional power in enacting the 1972 amendments, there must be a waiver by the State of Connecticut of its immunity under the Eleventh Amendment, there is ample indication of such "implied waiver" here. The State has enacted and administers its own Fair Employment Practices Law and participates in the deferral provisions of Title VII; yet when its own employment practices were drawn into serious question by this litigation, no corrective legislation was forthcoming. Furthermore, Connecticut has for years accepted substantial

federal funds which have expressly been conditioned upon nondiscrimination in projects and activities supported by those funds. Both Title VI of the Civil Rights Act of 1964 and the State and Local Fiscal Assistance [Revenue Sharing] Act of 1972 mandate such nondiscrimination. The nondiscrimination provisions with respect to the receipt and application of federal funds should therefore be read as conditioning such receipt upon a waiver of Eleventh Amendment immunity.

If there is any Eleventh Amendment immunity here, Congress will have enacted a Title VII right without a truly effective remedy for victims of state discrimination. They will not be "made whole" like private sector employees, nor will their state employer be deterred from continuing discriminatory practices until a federal court acts prospectively. Moreover, a federal court has the power under Title VII to shape a complex but interconnected equitable decree, which could, as to necessary monetary aspects, take account of any severe fiscal impact on the State. Thus the civil rights legislation petitioners seek to uphold accords with concepts of federalism—and the rule of law in our times.

Argument

I. IN AMENDING IN 1972 TITLE VII OF THE 1964 CIVIL RIGHTS ACT, CONGRESS CLEARLY EXPRESSED AND INTENDED TO AUTHORIZE SUITS FOR EMPLOYMENT DISCRIMINATION BY STATE EMPLOYEES AGAINST STATES, TOGETHER WITH ALL EQUITABLE REMEDIES, INCLUDING BACK PAY, AVAILABLE AGAINST A PRIVATE EMPLOYER.

In this case, "the threshold fact of Congressional authorization to sue a class of defendants which literally

includes States is wholly" present, not absent as in *Edelman v. Jordan,* 415 U.S. 651 at 672, *reh. denied,* 416 U.S. 1000 (1974). Thus the Second Circuit necessarily said that:

> "...it is evident that the 1972 amendments to Title VII ... did contemplate private actions against state governments or their agencies. Thus, ... Congress intended to authorize a private suit for backpay by state employees against the state. To suggest otherwise would be to hold Congress to a degree of legislative specificity it could not and does not customarily meet. See *Employees v. Department of Public Health and Welfare,* 411 U.S. at 289-90 (Marshall, J., concurring)". *Fitzpatrick v. Bitzer,* 519 F.2d 559, 567, 568 (1975) (App. 39a, 41a).

To amplify Congressional language and history (and with United States Code references to Section 701), 42 U.S.C. §2000e now defines "person" to include "governments, governmental agencies, political subdivisions". An "employer" is a "person engaged in an industry affecting commerce who has fifteen or more employees", and now an "industry affecting commerce" includes "any governmental industry, business, or activity." 42 U.S.C. §2000e(b) & (h). An aggrieved employee may file with the EEOC a charge against any employer, and then 42 U.S.C. §2000e-5(f) (1) expressly deals with the case "involving a government, governmental agency, or political subdivision". They may be prosecuted in the first instance only by the Attorney General, but aggrieved employees may intervene. If the Attorney General does not commence the action or enter into a conciliation agreement within 180 days, he shall notify the aggrieved employees who may bring a civil action within ninety days thereafter.

The United States District Courts shall have jurisdiction over all Title VII actions, and, if an unlawful employment practice is found by the court, all authorized relief, including injunctions, reinstatement, back pay, and

attorneys' fees are available against all covered employers without limitation. 42 U.S.C. §2000e-5(f) (3), (g) & (k).

Thus, in 1972 Congress erased virtually every distinction between the state as employer and any private employer. Identical treatment occurs throughout Title VII, except for initial enforcement procedures against governments by the Attorney General. If he fails to act timely, the right of suit and redress afforded aggrieved employees is the same whatever the nature of the employer. Had Congress wished to continue the dichotomy initially present in §2000e-5(f) in suits involving states, it could easily have done so. Had it wished to provide different remedies, or restrict monetary relief, it could easily have said so.

That Congress explicitly said what it intended is manifest from the legislative history. As originally enacted in 1964, Title VII did not cover state and local governments. This was a deliberate exclusion. House Rep. No. 914 (88th Cong., 2d Sess.), 1964 U.S. Code Cong. & Admin. News 2402. Both House and Senate reports accompanying the 1972 Amendments indicate that state employees were to be put on a par with all other employees and have access to all remedies under the Act. The House Report states:

> "Few of [the many state and local government] employees are afforded the protection of an effective forum to assure equal employment. The bill amends section 701 of the Civil Rights Act of 1964 ... to include State and local governments, governmental agencies and political subdivisions within the definition of 'employer' under Title VII. *All State and local government employees would under the bill have access to the remedies available under the Act.*
>
> . . .
>
> The expansion of Title VII coverage to State and local government employment is firmly embodied in the

> principles of the Constitution of the United States. The Constitution has recognized that it is inimical to the democratic form of government to allow the existence of discrimination in those bureaucratic systems which most directly affect the daily interactions of this Nation's citizens. The clear intention of the Constitution, embodied in the Thirteenth and Fourteenth Amendments, is to prohibit all forms of discrimination." House Rep. No. 92-238 (92d Cong., 1st Sess. 1971), 1972 U.S. Code Cong. & Admin. News 2152, 2154 (emphasis added).

Senate Report No. 92-415 concluded similarly:

> "The Committee believes that employees of State and local governments are entitled to the same benefits and protections in equal employment as the employees in the private industry section of the economy.
>
> ...By amending the present section 701 to include state and local governmental units within the definition of an 'employer' under Title VII, all State and local governmental employees would, under the provisions of the bill, have access to the remedies under the Act.
>
> . . .
>
> The last sentence of the Fourteenth Amendment, enabling Congress to enforce the Amendment guarantees by appropriate legislation, is frequently overlooked and the plain meaning of the Constitution allowed to lapse. The inclusion of state and local government employees within the jurisdiction of Title VII guarantees and protections will fulfill the Congressional duty to enact the 'appropriate legislation' to insure that all citizens are treated equally in this country." Senate Rep. No. 92-415 (92d Cong., 1st Sess. 1971); *Legislative History of the Equal Employment Opportunity Act of 1972,* 418-420 (hereafter cited as *Legislative History*).

Underlying the 1972 Amendments was the desire of Congress to give State and local government employees the same remedies already enjoyed by employees in private industry. Senator Williams, the Senate manager of the 1972 bill, argued,

> "At this time in our country's history it should be beyond question that the employees of State and local governments are entitled to the same benefits and protections in equal employment as are employees in the private sector". *Legislative History,* 1113. See also Hearings Before A Subcommittee of the Senate Labor and Public Welfare Committee, 92d Cong., 1st Sess., 59-60, 250, 400, 413, 414 (1971).

The Senate debates on proposals to retain the exemption indicate that Congress contemplated giving state and local employees the same judicial remedy already enjoyed by private employees. Senator Javits described "the power to litigate" against state and local governments as "the very least we can give the individual ... To me it is one of the most unchallengeable parts of the bill." *Legislative History,* 1174. Senator Williams placed in the record a Civil Rights Commission Report urging repeal of the exemption so that minority employees would be entitled to the court-appointed counsel and suspension of normal court costs authorized in Title VII cases. *Id.* 1123. Even those who supported continuation of the exemption recognized that, if it were repealed, the forum in which aggrieved state or local government employees could have their claims adjudicated was federal court. *Id.* 1105, 1167-8, 1610.

Congressional intent is further manifested by its comments on three decisions of this Court, two before and one after the adoption of the 1972 amendments to Title VII. The main Supreme Court decision regarding Congressional authorization of suits against the states was *Parden v. Terminal Railway of Alabama State Docks Dept.*, 377 U.S. 1864 (1964). Under the standard set by *Parden* no

special language or legislative history seemed required for a federal statute to authorize such suits; a state was to be treated as any other defendant in determining whether federal jurisdiction existed. Thus the Court in *Parden* found jurisdiction to enforce the Federal Employers' Liability Act against a state railroad because "We think that Congress, in making FELA applicable to 'every' common carrier in interstate commerce, meant what it said." 377 U.S. at 187. In adopting the 1972 amendments to Title VII, Congress expressly referred to and relied on *Parden.* Senate Rep. No. 92-415, p. 11, n.6; *Legislative History,* 1165. Congress also expressly relied upon this Court's decision in *Maryland v. Wirtz,* 392 U.S. 183 (1968). Of that decision the Senate Report said:

> "The Court rejected the argument that Federal regulation of the employment practices of State and local governments is an improper infringement upon the sovereignty of the States." Senate Rep. No. 92-415, p. 11; *Legislative History,* 1165.

Under these circumstances there can be no serious question that Congress intended what the language of these amendments expressly provided, that state and local government employees could sue their employers in federal court and obtain any or all of the remedies authorized in section 2000e-5(g).

Moreover, *Employees v. Department of Public Health and Welfare,* 411 U.S. 279 (1973), has been "overruled" by Congress. In *Employees* plaintiffs sued a state agency for back pay and other relief under the Fair Labor Standards Act, 29 U.S.C. §216(b). The statute in question, establishing a minimum wage and creating a federal cause of action, had been amended in 1966 to cover certain state agencies, but there had been no change in a section providing for suits by employees against their employer for unpaid wages and liquidated damages. The Court construed

the statute to apply the minimum wage to the states, but held that – despite the language of the 1966 amendment – Congress had not intended to permit federal lawsuits to enforce the FLSA against a state agency. The Court reasoned that, if Congress had intended to render a state subject to federal litigation, it would indicate by clear language "that the constitutional immunity was swept away." 411 U.S. at 285. Mr. Justice Brennan, dissenting, contended there was no reason to assume Congress would resort to any such special language merely because a state, as any other employer, was being included under the Act. 411 U.S. at 290.

In May 1974, Congress adopted yet another amendment to the Act reaffirming its decision to authorize actions by employees "against any employer (including a public agency) in any Federal or State court..." to enforce the minimum wage. Public Law 93-259, §6(d) (1); 88 Stat. 61. The House Report revealed that this had been the intent of Congress in 1966, and that this Court had misconstrued the law.

> "The committee also acted on an amendment to Section 16(b) of the Act to make clear the right of individuals employed by state and local governments and political subdivisions to bring private actions to enforce their rights and recover back wages under this Act. This amendment is necessitated by the decision of the U. S. Supreme Court in *Missouri, et al.* (April, 1973) which held that Congress in extending coverage under the 1966 amendments to school and hospital employees in state and local governments did not explicitly provide the individual a right of action in the Federal courts although the Secretary of Labor was authorized to bring such suits." House Rep. No. 93-913 (93d. Cong., 2d Sess.); 1974 U.S. Code Cong. & Admin. News, 2850.

Congress' action suggests that it thought the *Employees*

majority erred in stating that, if Congress wanted to render a state liable to suit, it would say so in a manner different than used to render any other defendant liable to suit.

Although Congress could be presumed to be aware of the Eleventh Amendment and sovereign immunity, it is doubtful that few members have any idea of these arcane principles or their scope. However, many if not most members of Congress are cognizant of "state sovereignty" – the contention that the federal government has no moral right, and perhaps no constitutional power, to interfere in the internal workings of state government. This "doctrine" had been invoked in opposition to every piece of federal civil rights legislation for a decade. Argument over that issue was to be expected at the suggestion that Title VII cover state and local employees, and it occurred.[1a] Proponents of extended coverage asserted expressly that that extension was within Congress' power under Section 5 of the Fourteenth Amendment.[1b] Both historically and conceptually sovereign immunity is only a procedural incident to the substantive notion of state sovereignty. A Congress willing to enact legislation overriding the well-aired and strongly defended idea of state sovereignty would not have hesitated to explicitly override comparatively obscure immunity principles if such ultimate specificity were necessary.

1a See, e.g. Hearings Before a Subcommittee of the House Education and Labor Committee, 92d Cong., 1st and 2d Sess., 373-4 (1971); Hearings Before a Subcommittee of the Senate Labor and Public Welfare Committee, 92d Cong., 1st Sess., 175; 117 Cong. Rec. 31971; *Legislative History*, 1104-76, 1610-45.

1b Hearings Before a Subcommittee of the Senate Labor and Public Welfare Committee, 92d Cong., 1st Sess., 411, 412-13, 414, 455-56 (1971); House Rep. No. 92-238 p. 19, Senate Rep. No. 92-415, p. 12. For a comprehensive history of the 1972 amendments, see Sape & Hart, *Title VII Reconsidered: The Equal Employment Act of 1972*, 40 Geo. Wash. L. Rev. 824, esp. 847-50 (1972).

Confronted with compelling evidence of pervasive and institutionalized discrimination in state employment, Congress has by every reasonable standard of language and intent authorized private Title VII suits against states and provided for full equitable relief, including monetary incidents. It thus intended to abrogate any "immunity" of states to recovery of back pay. Petitioners here followed the procedures of amended Title VII, established as private persons or as "private statutory attorneys general" intentional sex discrimination in Connecticut's employment laws, brought about an end to such *de jure* discrimination, and should be entitled to the full relief, including back pay, mandated by Congress. In short, Congress pronounced in this area full individual employment equality under law and provided full remedies in order to enforce this equality.

II. IN AUTHORIZING PRIVATE TITLE VII SUITS AND MONETARY RELIEF AGAINST STATES UNDER SECTION 5 OF THE FOURTEENTH AMENDMENT, CONGRESS HAS SATISFIED TESTS ESTABLISHED BY THIS COURT AND AFFORDED ANTI-DISCRIMINATION REMEDIES AND "PRIVATE" SUITS RECOGNIZED AS NECESSARY BY THIS COURT.

The Civil Rights Act of 1964 is based on Congressional power under both the Constitution's Commerce Clause (Art. 1, Sec. 8, C1. 3) and the Enforcement Clause (Section 5) of the Fourteenth Amendment. Section 5 provides, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article". As has been shown already, Congress in adopting the 1972 amendments recognized that discrimination by state and local governments violated the Fourteenth Amendment, and that inclusion of such governments within Title VII coverage was pursuant to Section 5. House Rep. No. 92-238, p. 18; Senate Rep. No. 92-415, pp. 10, 11.

> "Correctly viewed, §5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.
>
> We therefore proceed to the consideration ... under the *McCulloch v. Maryland* standard, whether §4(e) may be regarded as an enactment to enforce the Equal Protection Clause, whether it is 'plainly adapted to that end', and whether it is not prohibited by but is consistent with 'the letter and spirit of the constitution'." *Katzenbach v. Morgan,* 384 U.S. 641, 651 (1966).

The Court had already pointed out at 384 U.S. at 650 that *Ex parte Com. of Virginia,* 100 U.S. 339, 345-46 (1880), decided 12 years after the adoption of the Fourteenth Amendment, held that congressional power had the same broad scope expressed in the Necessary and Proper Clause, (Art. 1, Sec. 8, cl. 18) and the classic formulation of the scope of such powers by Chief Justice Marshall in *McCulloch v. Maryland,* 4 Wheat. 316, 421 (1819). Similar language of Section 2 of the Fifteenth Amendment has also been broadly construed. *South Carolina v. Katzenbach,* 383 U.S. 301, 323-7 (1966).[2] In these Fourteenth and Fifteenth Amendment "state action" cases, as well as in the Thirteenth Amendment private action case of *Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 440 (1968), this

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[2] In a later voting rights case, *Oregon v. Mitchell,* 400 U.S. 112 (1970), the Court upheld under various remedial theories the power of Congress to prohibit state use of literacy tests and suspend state residency requirements for presidential elections, but split on the attempt to legislate, non-remedially, the 18-year old vote. Mr. Justice Rhenquist, dissenting in *Fry v. United States,* 421 U.S. 542, 559 (1974), has recently stated that the Fourteenth and Fifteenth Amendments confer on Congress authority "to impose significant restrictions on what would otherwise be thought state prerogatives."

Court's test for judicial review became whether there was a rational basis for the action of Congress. Bason, *To Enforce These Rights,* 1973 Wis. L. Rev. 1085, 1092, 1097. The modern civil rights enforcement cases indicate Congress' predominant role in defining the scope of the enforcement of the Equal Protection Clause.

Just as governmental employees need Title VII protection given to employees of private industry, so also is their need for monetary remedies as great and as justified.

> "The power to award backpay was bestowed by Congress, as part of a complex legislative design directed at a historic evil of national proportions.... If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality... It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination. This is shown by the very fact that Congress took care to arm the courts with full equitable powers... Furthermore, in passing the Equal Employment Opportunity Act of 1972, Congress considered several bills to limit the judicial power to award backpay. These limiting efforts were rejected...backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Albemarle Paper Company v. Moody,* 422 U.S. 405, 416, 417, 418, 420, 421 (1975).

Without monetary relief, states will be able to use much less than deliberate speed to end discriminatory practices, and could even postpone with virtual impunity the day of final reckoning in the form of a prospective injunctive decree. Without monetary relief, the thousands of state employees who have been or will be victims of employment discrimination will not be "made whole" and

will not be put on a par with their counterparts in private industry as Congress intended. Without the prospect of back pay, victims of state discrimination would be less likely to bring suit if the Attorney General did not; and without attorneys' fees also, "private" suits, not discrimination, would be eradicated.

Furthermore, the Attorney General has insufficient staff or resources to seek relief for all those state employees who are victims of discrimination. His efforts would be confined to the largest or most egregious cases, and even in those, he may only seek prospective enforcement and be unwilling or reluctant to seek back pay relief. If the Second Circuit's holding is affirmed, then Congress would be hard-pressed to prescribe effective enforcement except by greatly increasing the Attorney General's staff and funding.

Aside from whatever factual support the Solicitor General may furnish to bolster the common sense claims of the preceding paragraph, this Court has found that Congress considered the policy against discrimination to be of the highest priority and private enforcement of Title VII to be a paramount objective. *Alexander v. Gardner-Denver Company,* 415 U.S. 36, 45, 47 (1974):

> "In addition to reposing ultimate authority in federal courts, Congress gave private individuals a significant role in the enforcement process of Title VII....the private right of action remains an essential means of obtaining judicial enforcement of Title VII.... In such a case the private litigant not only redresses his own injury but also vindicates the important Congressional policy against discriminatory employment practices."

cf. Trafficante v. Metropolitan Life Insurance Company, 409 U.S. 207, 211-12 (1972).

In the case of governmental employees, such "private" suit nas a significant extra ingredient. Plaintiffs are acting in

place of the Attorney General under 42 U.S.C. §2000e-5(f)(1); they thus possess the nature of *statutory* private attorneys general seeking to vindicate important national rights of thousands of Connecticut's employees. The "delicate federal-state relationship" is no more jeopardized by their action as plaintiffs, than it is by suit of the Attorney General. The Second Circuit is additionally incorrect (App. 45a, n. 18) in suggesting a difference because "plaintiffs seek the back benefits solely for themselves", for if the Attorney General had sought and obtained back benefits, they would still inure to the entitled state employees. And such "benefits" are not of an ordinary private compensatory damage character. Congress had reason to give the Attorney General discretion to bring suit or not, and reason to give employees financial incentive to attack discrimination in federal court when the Attorney General could not or would not sue. Such suits as this are in effect suits by the United States against a state, and not barred by the Eleventh Amendment. *United States v. Mississippi*, 380 U.S. 128, 140-141 (1965); see Note, *A Practical View of the Eleventh Amendment*, 61 Geo. L. J. 1473, 1498 (1973).

The Second Circuit erred not only in potentially devastating the enforcement of Title VII against States but also in asserting Congress had at its disposal in enforcing Fourteenth Amendment rights methods other than "federal damage suits" and then suggesting non-private or state-oriented methods. As we have shown, this is contrary to the specific mandate of Congress in amending Title VII in 1972, and, as we will demonstrate, it is contrary to the history of the adoption of the Fourteenth Amendment and legislation such as 42 U.S.C. §§1981-1983 – all of which manifest an intent to make federal courts the first line of defense in civil rights matters, usually in suits by private litigants.

> "After the War between the States, 'nationalism dominated political thought and brought with it congressional investiture of the federal judiciary with

> enormously increased powers'. *Zwickler v. Koota*, 389 U.S. 241, 246 (1967). Section 1983 was enacted at that time as §1 of the Civil Rights Act of 1871, 17 Stat. 13. 389 U.S., at 247. That Act, and the Judiciary Act of 1875, that granted the federal courts general federal question jurisdiction, completely altered Congress' pre-Civil War policy of relying on state courts to vindicate rights arising under the Constitution and federal laws. 389 U.S., at 245-246." *Huffman v. Pursue Ltd.*, 420 U.S. 592, 616, 617 (1975), (Brennan, J. dissenting).

In addition, the Second Circuit's suggestions are contrary to the history and tradition of most civil rights litigation. Where would efforts to end racial discrimination in Southern schools be – not to mention this and other forms of discrimination in all geographical areas – without private litigants in federal courts? The suggestion overlooks the actual experience with states. Connecticut may, for instance, support the paramount national policy with a plethora of anti-discrimination legislation (A. 5 *et. seq.*), yet it curiously seeks to avoid monetary redress to its citizen-employees when it has erred. Connecticut's legislature failed in two successive annual sessions following the 1972 Amendments to Title VII and this lawsuit, to conform to the mandate of Congress by eliminating the discrimination manifested in the very language of its retirement laws. Connecticut thus necessitated a federal court injunction (A. 4) – and in the process gained time at the expense of retired employees which aggravated the very issue now presented to this Court. This response on the part of the employer-state is no different from that which this Court recently indicated in *Albemarle Paper Company v. Moody, supra*, might be expected from a private employer if an award of back pay were not obtainable.

Whatever states may say in statutes and do about discrimination in the future, even an enlightened state like Connecticut has shown that it must be brought into federal

court where its employees are involved; and it will there assert any defenses available to "maintain its treasury" whatever its commitment to ending discrimination might otherwise be. In other words, Connecticut has shown the recalcitrance in regard to civil rights when its own interests are at stake which continues to justify the lack of confidence in state action that the framers of the Fourteenth Amendment and the early Civil Rights Acts saw so well over 100 years ago.

In enacting and amending Title VII, Congress has satisfied the tests of *Katzenbach v. Morgan, supra.* The legislation enforces rights secured by the Equal Protection Clause of the Fourteenth Amendment and is plainly adapted to that end. Congress was dealing with the fundamental human right to be treated equally, and in Title VII it legislated a complex of remedies necessary to enforce that right —injunctions to stop employment discrimination; back pay to deter it and, together with reinstatement, make whole its victims; and attorneys' fees to encourage enforcement of Constitutional principles and Congressional policies by private individuals. That legislation "consists with the letter and spirit of the Constitution", the Eleventh Amendment notwithstanding (as discussed at length in the final Section, IV). Since the principles underlying this action arise out of fundamental Constitutional guarantees under the Fourteenth Amendment, this Court's recent decision in *Edelman v. Jordan,* 415 U.S. 651 (1974), is not apposite. *Id.* 415 U.S. 651, 694 n. 2 (Marshall, J. dissenting). Indeed, this Court has repeatedly suggested, though never decided, that the very adoption of the Fourteenth Amendment may have limited *pro tanto* the Eleventh Amendment. *Ex parte Young,* 209 U.S. 123, 150 (1908); *Curtis v. Loether,* 415 U.S. 189, 198 n. 15 (1974); *Edelman v. Jordan, supra,* 415 U.S. at 694 n. 2. Assuming such *pro tanto* limitation, an award of back pay in this case would certainly be consistent with the letter and spirit of the Constitution, and with most praiseworthy national policy. Further, even without respect to such limitation, the State of Connecticut has waived any

immunity under the Eleventh Amendment (a matter addressed in the next Section, III).

III. RECENT DECISIONS OF THIS COURT INDICATE THAT UNDER APPROPRIATE CIRCUMSTANCES A STATE MAY BE RENDERED LIABLE TO SUIT IN FEDERAL COURT; SUCH CIRCUMSTANCES OF CONGRESSIONAL INTENT TO ABROGATE IMMUNITY AND STATE WAIVER OF IMMUNITY ARE PRESENT IN THIS CASE.

A. The Commerce Clause and implied waiver cases support Title VII relief:

This Court has approved the use of the commerce power to eliminate discrimination, in upholding the public accommodations section, Title II, of the 1964 Civil Rights Act. *Heart of Atlanta Motel v. United States,* 379 U.S. 241 (1964); *Katzenbach v. McClung,* 379 U.S. 294 (1964). Title VII was also founded on the Commerce Clause and the definition of employer as a person "engaged in an industry affecting commerce" has remained essentially unchanged. 42 U.S.C. §2000e(b). Congress has made a rational determination that the unrest which could be generated by employment discrimination posed a threat to the free flow of commerce and therefore should be prevented in order to protect commerce. *Equal Employment Opportunities Commission, Legislative History of Titles VII and IX of the Civil Rights Act of 1964,* 3075-94 (1967). State governments employ many persons and utilize goods which travel in interstate commerce, and, as with private industry, discriminatory governmental employment practices jeopardize commerce. Consequently Title VII as amended constitutes a valid exercise of the power of Congress to regulate interstate commerce. See Comments, *Suing the State under Title VII in the Face of the Eleventh Amendment,* 1973 Wis. L. Rev. 1099, 1102-4.

Assuming, *arguendo,* any need to show that the state has "in effect consented to the abrogation of [its] immunity", circumstances showing such "constructive consent" or implied waiver predominate in this case. *Edelman,* 415 U.S. at 672. When the constitutionality of state law or conduct is in issue, a state, absent its express consent, should perhaps only be suable in federal court through its officers, under the reasoning of *Ex parte Young,* 209 U.S. 123 (1908). In recent decades, however, as Congress made greater use of its powers and subjected states to increased regulation, a rationale had to be found to prevent states from frustrating such federal regulation by determining themselves their immunity limits. The new rationale was "implied waiver" – which suggests some state activity but largely makes Congress the arbiter of states' immunity in areas subject to its regulation. Commerce Clause cases and even this Court's most recent Eleventh Amendment decision in *Edelman* lend support to the contention that in the case at bar there are circumstances of implied waiver sufficient to overcome any residue of state immunity.

In *Petty v. Tennessee-Missouri Bridge Commission,* 359 U.S. 275 (1959), plaintiff had sued under the Jones Act for wrongful death under a federal law, but her case had been dismissed below based upon lack of waiver under state law. This Court rejected the determination of state law but looked instead to the compact between the two states. The compact under Article I, Sec. 10 had been approved by Congress, included a sue and be sued clause, and stated that nothing in it should impair "any right, power, or jurisdiction of...any court...of the United States or in regard to any navigable waters or any commerce between the states". The states were held to have waived their immunity by submitting to conditions imposed by Congress under its powers over interstate commerce.

The next case broadened the scope of Congressional power to waive state immunity. *Parden v. Terminal Railway,*

supra, 377 U.S. 184 (1964), involved a provision of the Federal Employers' Liability Act authorizing employees of a state owned railroad to sue in federal court for personal injuries sustained in the course of employment. Alabama contended that, to the extent that the FELA authorized such a suit against a state agency, it violated the Eleventh Amendment and was therefore unconstitutional. The Supreme Court rejected this argument on two grounds. The Court held, first, that the power to subject the state to suit was inherent in Congress' power to regulate interstate commerce.

> "Congress enacted the FELA in its constitutional power to regulate interstate commerce. ... While a State's immunity from suit by a citizen without its consent has been said to be rooted in 'the inherent nature of sovereignty;' ... the States surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce. ... By empowering Congress to regulate commerce, then the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation. Since imposition of the FELA right of action is within the congressional regulatory power, it must follow that application of the Act to such a railroad cannot be precluded by sovereign immunity. ... By adopting and ratifying the Commerce Clause, the States empowered Congress to create such a right of action against interstate railroads..." 377 U.S. at 191-192.

Second, the Court reasoned that in adopting the FELA Congress had conditioned the operation of an interstate carrier on the waiver of any immunity from suit and that Alabama had waived its immunity when it undertook to operate a railroad. Furthermore, waiver or consent was made a question of federal law, since the Court realized the state's determination could render Congressional power meaningless. Even the Justices who disagreed with the majority's interpretation of the FELA agreed it was within

the power of Congress to subject a state to suit. 377 U.S. at 198.

While *Parden* is also distinguishable from the case at bar on basis of its facts, it is still good precedent on implied waiver. Moreover, Title VII was adopted in part pursuant to the powers of Congress under the Commerce Clause, so the basis for upholding the FELA in *Parden* should sustain the assaulted portions of Title VII.

In *Employees v. Department of Public Health, supra,* 411 U.S. 279 (1973), the Court concluded (erroneously according to Congress, *supra* p. 17) that Congress had not intended to remove the immunity of state agencies from federal suit under the Fair Labor Standards Act, but agreed that it had the power to do so if it wished. Speaking for the majority, Justice Douglas said:

> "Where employees in state institutions not conducted for profit have such a relation to interstate commerce that national policy, of which Congress is the keeper, indicates that their status should be raised, Congress can act .... But we have found not a word in the history of the 1966 amendments to indicate a purpose of Congress to make it possible for a citizen of that State or another State to sue the State in federal court." 411 U.S. at 284-85.

Consequently, he did not reach the issue of the state's actions under the implied waiver rule. Justice Brennan dissented from the majority's construction of the FLSA, but agreed that Congress had the power to lift a state's immunity. 411 U.S. at 298-324.

This Court held in *Edelman* that the Eleventh Amendment was a jurisdictional bar to retroactive payment from the state treasury of welfare benefits found to have been wrongfully withheld, and that the State of Illinois did not "constructively consent" to the suit by participating in

certain welfare programs and agreeing to administer federal and state funds in compliance with federal spending laws. All Justices appeared to agree that Congress had the power to subject the states to suit, but the dissenters urged that the state had waived its immunity in the sense noted in *Parden,* 415 U.S. at 678-696. Speaking for the majority, Justice Rehnquist said:

> "The question of waiver or consent under the Eleventh Amendment was found in those cases [*Petty, Parden,* and *Employees*] to turn on whether Congress had intended to abrogate the immunity in question, and whether the State by its participation in the program authorized by Congress had in effect consented to the abrogation of that immunity.
>
> But in this case the threshold fact of congressional authorization to sue a class of defendants which literally includes States is wholly absent." 415 U.S. at 672.

Thus plaintiffs there could not rely on those three cases – but petitioners here can and do.

Plaintiffs in *Edelman* sought to enforce pursuant to 42 U.S.C. § 1983, rights granted under federal welfare legislation. § 1983, however, did not explicitly authorize suit against the state but just against persons, such as the state officials, acting "under color of State law". That is the main reason why only prospective injunctive relief was held available, and not also an order compelling "equitable restitution".

> "But it has not heretofore been suggested that § 1983 was intended to create a waiver of a State's Eleventh Amendment immunity merely because an action could be brought under that section against state officers, rather than against the State itself." 415 U.S. at 675-7.

Here there is a different question than in *Edelman* because the threshold fact of clear authorization to sue the states is present. Congress did authorize such "private" suits, and was acting pursuant to its powers under both the Fourteenth Amendment and the Commerce Clause. The Second Circuit erred in extending *Edelman* to dispose of the question here, and in relying on some of the same inapposite cases cited in *Jordon v. Gilligan*, 500 F.2d 701, 709 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1975) and *Skehan v. Board of Trustees of Bloomsburg State College*, 501 F.2d 31, 43 n. 7 (3d Cir. 1974), *vacated and remanded* 421 U.S. 983 (1975). Like *Edelman*, those cases do not involve the enforcement of underlying claims arising from the violations of substantive rights protected by the 14th Amendment. For instance, in *Shapiro v. Thompson*, 394 U.S. 618 (1969), it was held that Congress could not authorize the states to violate the Equal Protection Clause by a section of the Social Security Act which authorized a one year waiting period for welfare benefits; this Congressional action was almost the opposite of what Congress did in 1972 in amending Title VII.

Thus, as already indicated, inquiry as to the scope of Congressional power should end once the "threshold fact" has been found in the context of Section 5 of the Fourteenth Amendment, as bolstered by the Commerce Clause and previously cited cases under both. However, if further inquiry is pertinent because of the consequences to the state treasury, *Edelman* acknowledges that injunctive decrees have "ancillary effects on such treasuries", and allows latitude to find "constructive consent" by the State.

> "We must judge the award actually made in this case, and not one which might have been differently tailored in a different case. ... As in most areas of the law, the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night." 415 U.S. at 67.

B. The State's activities show implied waiver:

While the degree of any "implied consent" in civil rights cases should be restricted, Connecticut has taken certain actions from which, singly or together, its consent can be deduced. First of all, it has embraced the strong national policy of combatting discrimination by an array of legislation, and also exemplified in Article I, Section 20 of its 1965 Constitution. (A. 9 *et. seq.*) The existence of such state legislation is relevant under *Heart of Atlanta Motel v. United States, supra,* 329 U.S. at 259-61. Connecticut has provided agencies, prohibitions, sanctions and relief similar to Title VII and to federal anti-discrimination laws in other areas. Significantly, it has not only adopted its own Fair Employment Practices Law, Conn. Gen. Stat. 31-122 *et. seq.*, but it also administers such laws *together with* the deferral provisions of Title VII, e.g. 42 U.S.C. §2000e-5(d). *cf. Parden* and *Petty, supra.* Having thus agreed with the endeavors of Congress to fight discrimination in all important respects, it should not thereafter be able to carve out an exception in order to avoid payment to its victimized employees who had to resort to federal court. And in no sense does deterrent back pay relief interfere with Connecticut's performance of its functions as a government or with "cooperative federalism."

Secondly, Connecticut was put on notice when Congress passed the 1972 amendment that it would be placed under the same restrictions as other employers, yet it took no corrective action. In the face of an expanded Title VII, the EEOC guidelines of April 1972 (App. 17a), and plaintiffs' EEOC complaint and lawsuit, Connecticut's General Assembly did not seize the opportunity in either its 1973 or 1974 sessions to correct the discrimination written into its retirement laws. The State necessitated the injunctive relief that was finally rendered by the District Court, yet it then did not even appeal that decision. This situation raises "the spectre of a state, perhaps calculatingly, defying federal law". *Edelman,* 415 U.S. at 692 (dissenting

opinion). This sort of inaction contrary to public interest should be deterred, not encouraged by a shield of "immunity". The money sought here is for remedial and deterrent purposes, unlike the damages of essentially compensatory character in *Edelman* and a case it approvingly cited, *Rothstein v. Wyman,* 467 F.2d 226 (2d Cir. 1972), *cert. denied,* 411 U.S. 921 (1973).

Moreover, the notice ingredient added to implied waiver principles by *Employees* has no place in a discrimination case. The situation is instead much like *Parden:* Connecticut knew its retirement system was discriminatory, and after the March 1972 amendments, it knew of its duties and liability to federal court suit. Yet it did not change its discriminatory retirement system, and it did participate in the Title VII deferral provisions. Unlike the State of Missouri in *Employees,* Connecticut had some choice, but more importantly, it had no business discriminating and should not rely on lack of notice. Also, the strict waiver standards of habeas corpus cases involving vital legal rights of individuals in criminal contexts, *cf. Fay v. Noia,* 372 U.S. 391, 439 (1963), should not be extended to the immunity of states. Note, *A Practical View of the Eleventh Amendment,* 61 Geo. L. J. 1473, 1495 (1973). A state has "knowledge" only through its agents, and it – or they – should expect that certain activities will become the concern of federal remedial legislation.

Thirdly, the State waived a portion of its immunity when on June 30, 1866 it ratified the Fourteenth Amendment (an aspect of the case discussed in the Section IV of this brief). It thereby consented to any reasonable Congressional legislation to implement that amendment and to provide remedies for discrimination otherwise inconsistent with the Eleventh Amendment.

C. Such waiver is further shown by state receipt of federal funds:

In adopting the 1972 amendments to Title VII Congress was especially concerned that state agencies which were the recipients of federal grants be prevented from engaging in racial discrimination. Senator Williams argued in support of applying Title VII to state and local governments:

> "The Federal Government's interest in State and local government operations cannot be underestimated. There are approximately 10 million employees of State and local political subdivisions. The Federal Government alone will distribute more than $43 billion of its tax revenues to those levels in the next year. ...
>
> Mr. President, it is clear that with the expenditure of such sums comes the responsibility of making sure that the distribution and use of the funds is without discrimination. The failure to have adequate minority representation in those agencies of Government responsible for expending those funds is an element of this discrimination." *Legislative History,* 114-15; see also 1138-51.

The Civil Rights Commission, which also supported such coverage, urged:

> The receipt of Federal grant-in-aid funds and the accompanying responsibility for implementing the Federal program supported by the Funds engender numerous job opportunities with the recipient State and local agencies. The obligations of the Federal Government with respect to discriminatory actions by these recipients are based on the Due Process Clause of the fifth amendment which prohibits governmental support or involvement in discriminatory activities. Its involvement in grant programs as financier, prescriber of standards, and supervisor of execution, imposes a duty on the Federal Government to ensure that there is no discrimination in the job opportunities provided by the funds. *Id.* 1123.

The particular concern of Congress to subject grant recipients to the provisions of Title VII is clear.

This strong concern of Congress that federal funds not be expended by the several states in programs or activities under which any person may be denied benefits or participation because of prohibited forms of discrimination also finds unambiguous expression in both Section 601 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d, and Section 122 of the State and Local Fiscal Assistance Act of 1972 (hereinafter referred to as the Revenue Sharing Act), 31 U.S.C. §1241. Section 122(a) of the Revenue Sharing Act provides:

> "No person in the United States shall on the ground of race, color, national origin, or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under [the Revenue Sharing Act]."

Section 601 of Title VI contains identical language, except that it inexplicably does not encompass sex discrimination and it applies to "any program or activity receiving Federal financial assistance".

Pursuant to his authority under Section 142(a) of the Revenue Sharing Act, 31 U.S.C. §1262(a), the Secretary of the Treasury has promulgated regulations interpreting the anti-discrimination provisions of that Act, 31 C.F.R. §51.32 and 31 C.F.R. §§51.50 *et seq.*, 40 F.R. No. 208, Oct. 28, 1975, pp. 50029-32. Although the original anti-discrimination regulations contained in §51.32 were applicable to this case in a general way, the specific applicability of the recent amendments is unmistakable. Section 51.54(c) (2) provides in pertinent part:

> "It shall be an unlawful employment practice for [a recipient government] employer to have a pension or retirement plan which establishes different optional or compulsory retirement ages based upon sex. It shall be an unlawful employment practice for an employer to provide for both unequal benefits and unequal contributions in the areas of insurance, pension or retirement plans, welfare or other fringe benefits programs. Further, it shall be an unlawful employment practice for an employer to provide for either unequal benefits or unequal contributions in such areas unless such unequal benefits or unequal contributions are directly related to actuarial differences."

Like the other states, Connecticut has received and continues to receive substantial federal assistance, both in revenue sharing funds and in federal grants-in-aid. Since the inception of revenue sharing in 1972, Connecticut has received, or will receive during the current fiscal year, an estimated $114,000,000 at the state governmental level alone. See Report, *Current Economic Developments and the Effects on Connecticut State Revenues,* Office of Fiscal Analysis, Joint Committee on Legislative Management, Connecticut General Assembly, prepared March 21, 1975, pp. 26, 27 (hereinafter cited as *Report*). During the same general period, it has received or will receive approximately $637,101,000 in federal grants-in-aid. *Report,* p. 31, and Connecticut's *State Budgets for Fiscal Years 1972-3, 1973-4* and *1974-5.* Moreover, these figures do not include federal funds which go directly to various state agencies. *Report,* p. 28. Under the Revenue Sharing Act, federal funds received at the state level are not required to be applied for any particular purpose, as they are at the local level, 31 U.S.C. §1222, and Connecticut merely adds its revenue sharing funds to its General Fund. See, *e.g. The State Budget for The 1974-75 Fiscal Year,* Office of Fiscal Analysis, Connecticut General Assembly, July 1974, p. 18. Thus, virtually every program or activity undertaken by the State of Connecticut is funded in whole or in part by federal revenue sharing funds, the receipt of which was clearly

conditioned upon nondiscrimination. Equally clearly the State violated that condition.

The nexus between the nondiscrimination provisions of the Revenue Sharing Act and of Title VI of the 1964 Civil Rights Act and the extension in 1972 of the coverage of Title VII of that very same Civil Rights Act to state employees evidences a Congressional purpose to secure to those employees the same rights and remedies enjoyed by employees in the private sector. The legislative history of the 1972 amendments also reflects that purpose. If indeed there is a sovereign immunity exception to the 1972 coverage, Congress will have created a right without a truly effective remedy. This Court has heretofore been "unwilling to conclude that Congress intended so pointless and frustrating a result". *Parden v. Terminal Railway*, 377 U.S. at 190. Taken together, Title VI and Title VII, as amended, and the Revenue Sharing Act, must be read as conditioning the receipt of federal funds upon a waiver of sovereign immunity to the full extent of the remedies authorized by Title VII. By its acceptance of federal funds upon the appurtenant condition of nondiscrimination, Connecticut has waived its immunity to that extent.

In conclusion, according to "implied waiver" principles of Commerce Clause cases, Congress had the power to subject states to federal court suits. In the sensitive area of federal-state relations, it is fitting the Congress – made up of representatives of the various states – should have superior authority in matters of great national concern affecting individual rights. See Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1954). As to basic civil rights protected by the Fourteenth Amendment, the case for final Congressional authority is even more compelling and the need to demonstrate actions indicative of state consent is less relevant, if appropriate at all. Furthermore, federal "interference" is minimized when the State has itself

adopted strong anti-discrimination measures similar to federal laws and accepts federal revenue-sharing funds. Then the objection comes down to merely the monetary aspect of the total available and interconnected remedies. Yet, even here, Congress in its wisdom and concern for balanced federalism has given federal courts latitude to fashion the "equitable relief...appropriate." 42 U.S.C. §2000e-5(g). Thus the court "may" and can take cognizance of the state fisc and shape its decree accordingly. Guidance would be furnished by *Albemarle Paper Company v. Moody, supra,* 422 U.S. at 421, i.e., a back pay award could be reduced where this would "not frustrate the central statutory purposes of eradicating discrimination". Or a large award could be paid in future installments. In this case, full monetary relief is justified, mainly due to Connecticut's inexplicable procrastination. *cf. Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); *Mitchell v. DeMario Jewelry, Inc.*, 361 U.S. 288, 291-92 (1960).[3] The consideration, however, that the federal court could under the statute take some account of the State's fiscal interests – perhaps by emphasizing the deterrent over the "make whole" purpose – indicates that Congress has not abused its power. Congress was given this power under two parts of the Constitution, it has necessarily and reasonably exercised the power, and it and the federal courts must retain such power unimpaired in

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[3] It should be noted that the method of funding Connecticut's retirement system does not involve the immediate "disruption" of the state treasury and budget which would usually result from a sizeable "retroactive" award, and which concerned the Court in *Edelman*, 415 U.S. at 666 n.11. Any recalculated benefits due retired male employees would first be paid from the monies already held in trust in the Retirement Fund under Conn. Gen. Stat. §5-156 (A. 20). While the general state treasury would subsequently have to "make up" the depletion of the Fund, this obligation can be budgeted for future years. The fiscal impact on the state is much like – and probably much less than – the ancillary effects of state compliance with the "prospective" decree. Note, *Attorneys' Fees and the Eleventh Amendment*, 88 Harv. L. Rev. 1875, 1880-82 (1975).

order effectively to combat discrimination against individual state employees.

IV. STATES' ELEVENTH AMENDMENT IMMUNITY HAS BEEN LIMITED BY LATER ENACTMENT OF FOURTEENTH AMENDMENT TO THE EXTENT THAT SUCH LIMITATION IS APPROPRIATE OR NECESSARY TO EFFECTUATE PURPOSES OF THE FOURTEENTH AND INTENTION OF CONGRESS IN ENACTING ANTI-DISCRIMINATION LEGISLATION UNDER SECTION 5.

A. This Question was not decided in Edelman:

The heading somewhat restates the question two members of this Court stated was unresolved in *Edelman v. Jordan,* 415 U.S. at 694 n. 2; *cf. Curtis v. Loether,* 415 U.S. 189, 198 n. 15 (1974). In *Ex parte Young,* 209 U.S. at 150, this Court expressly left open the question of whether the Eleventh Amendment had been limited by the later enactment of the Fourteenth. In *Edelman,* unlike this case, the Court was confronted with a claim for monetary awards arising out of a violation by a state of federal regulations implementing the Aid to the Aged, Blind and Disabled programs. The Court was not faced with, and did not decide, the question of whether, in the context of an action to enforce fundamental rights arising out of the Fourteenth Amendment and Congressional legislation under Section 5 of that Amendment, there need be any finding that the state had waived its immunity. The Second Circuit erroneously concluded that *Edelman,* "expressly overruled...[three] cases involving Fourteenth Amendment causes of action, insofar as those cases allowed assessment of retroactive damages against the state". (App. 47a) That conclusion implies that *Edelman* bars a monetary award in all events. To the contrary, however, this Court was careful not to overrule those three cases, but only stated that, "we *disapprove* the Eleventh Amendment holdings of those cases

to the extent that they are inconsistent with our holding today." 415 U.S. at 671 (emphasis added) This Court did no more than urge caution when relying on such cases in the Eleventh Amendment context. It could do no more in *Edelman* because the Fourteenth Amendment issue presented here was not at stake, and it was not decided. If the Court does not consider that the reasons previously advanced by petitioners are sufficient to uphold their back pay – and attorneys' fees – claims based on Title VII, the Court should then turn its attention directly to this significant question, and decide that rights of individuals to equal protection as enforced by act of Congress must take precedence over any irreconcilable aspects of state immunity under the Eleventh Amendment.

To the extent that any conflict exists between the policies of the Eleventh Amendment and Section 5 of the Fourteenth Amendment, it is the Fourteenth Amendment which must prevail. Here, as in the case of inconsistent statutes, the specific and more recent provisions of the Fourteenth Amendment must prevail over the earlier and more general provisions of the Eleventh. The Fourteenth Amendment

> "was adopted as an amendment to the Constitution and operates as an amendment of every part of the Constitution to which it is at any time found to be repugnant.... It is the last declared will of the law-maker, and has paramount force and effect." *The Virginia Coupon Cases,* 114 U.S. 269, 331 (1885).

That the Fourteenth Amendment must authorize the adoption of all the relief provisions in Title VII is apparent from the legislative history of the Amendment itself.

B. Sovereign immunity has no application to activities which the Reconstruction Amendments placed outside the sovereign power of the States:

Sovereign immunity, the doctrine that a state cannot be sued without consent, is but a procedural incident to sovereignty itself, the right and power of a state to conduct its affairs in whatever manner it sees fit and without outside limitations. Sovereign immunity serves to protect the state, particularly the executive branch, in the exercise of this power from control or regulation by the judiciary.

In the discussions of sovereign immunity at the end of the eighteenth century, particularly those leading to the inclusion of some of that immunity in the Eleventh Amendment, the question of whether and to what extent a state had sovereign immunity was understood to turn on whether and to what extent the state itself was sovereign. The most important judicial exposition of the case for sovereign immunity is Justice Iredell's historic dissent in *Chisholm v. Georgia,* 2 U.S. (2 Dall.) 419, 429 (1793). Justice Iredell reasoned that the state had, subject to certain limitations, succeeded to the sovereignty of the King, and that the immunity from suit attendant to this sovereignty had not been waived or lifted by Article III of the Constitution:

> "No other parts of the common law of England, it appears to me, can have any reference to this subject, but that part of it which prescribes remedies against the crown. Every state in the union in every instance where its sovereignty has not been delegated to the United States, I consider to be as completely sovereign, as the United States are in respect to the powers surrendered. The United States are sovereign as to all the powers of government actually surrendered. Each state in the union is sovereign as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the states have surrendered to them. Of course the part not surrendered must remain as it did before."

The other members of the Court, while concluding that

Georgia could not claim immunity, agreed that procedural immunity and substantive sovereignty were inseparable. Justice Blair concluded that the states had waived both sovereignty and immunity by ratifying Article III. 2 U.S. at 452. Justice Cushing believed that Article III had abridged the sovereignty of the states and with it their immunity. *Id.* at 468. Justice Wilson and Chief Justice Jay maintained the state had no immunity because the people, not the state, were the sovereign. *Id.* at 453-466, 469-479. Hamilton, in the oft quoted argument for immunity in *The Federalist,* was also of the view that immunity derived from, and could not be asserted in the absence of, state sovereignty:

> "It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the Government of every State in the Union. Unless therefore, there is a surrender of this immunity in the plan of the Convention, it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty, were discussed in considering the Article of taxation, and need not be repeated here." (Number 81)

The discussion of taxation, contained in *The Federalist* No. 31, dealt with the extent to which the states had surrendered their *power* to enact certain types of taxes. (The same connection between the state's power and procedural immunity is reflected in the opinion in *Employees,* 411 U.S. at 287, 317.)

Justice Iredell rejected the suggestion that the states had never been sovereign or that that sovereignty had been waived by ratifying Article III of the Constitution creating federal jurisdiction over actions between a state and a citizen of another state. See Jacobs, *Sovereign Immunity*

and the Eleventh Amendment, 64-74 (1972). But both Iredell and Hamilton conceded state sovereignty could be lost by a substantive constitutional limitation on the powers of the states and that, in such a case, immunity would fail as well.

At the time this was a theoretical concession of no practical consequence. The Constitution as it existed prior to the Civil War contained few significant limitations on the sovereignty of the states in dealing with individual citizens The concept of federalism prevailing at that time left largely in the hands of the states decisions as to what basic rights, if any, individuals should have against state action, and how, if at all, those rights should be enforced. The national government assumed no substantial role under the Constitution in regulating the internal affairs of the states; such matters were conceived to properly be consigned to the exclusive jurisdiction of the states, and any federal interference would have transgressed the rights and reserved powers of the states. Disputes between states and individuals raising federal questions could reach the federal courts only under Section 25 of the Judiciary Act of 1875 providing for review in the Supreme Court. The few such cases which did reach the Supreme Court involved, not violations of federally protected rights, but state actions interfering with the conduct of the national government. See, *e.g., Osborn v. Bank of the United States,* 22 U.S. (9 Wheat.) 738 (1824); *Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264 (1821). So long as the states' sovereignty in dealing with individual citizens remained intact, the immunity incident to that sovereignty was entirely appropriate.

In the decade following the Civil War this situation was deliberately and drastically altered by adoption of the Thirteenth, Fourteenth and Fifteenth Amendments, which expressly limited the power of the states in their relations with private citizens. Those enactments, together with the statutes enforcing them, created a panoply of federal rights designed to implement the new national commitment to

racial justice. Congress clearly conceived that it was altering the relationship between the states and the nation, and working a "vast transformation" from the concepts of federalism that had prevailed in the late 18th century. *Mitchum v. Foster,* 407 U.S. 225, 242 (1972); *Zwickler v. Koota,* 389 U.S. 241, 245-46 (1967). The effect of those Amendments was to overturn several of this Court's earlier decisions regarding the rights of individuals against the states and the ability of the national government to protect those rights. See *Barron v. Baltimore,* 32 U.S. (7 Pet.) 243 (1833); *Dred Scott v. Sandford,* 60 U.S. 393 (1857).

The changes wrought by the Reconstruction Amendments were understood to work a substantial restriction on the prior sovereignty and reserved rights of the states and were opposed on just this ground. Congressman Edgerton, speaking against the Thirteenth Amendment, argued:

> "Better, sir, for our country, better for man, that negro slavery exist a thousand years than that American white men lose their constitutional liberty in the extinction of the constitutional sovereignty of the Federal States of the Union." Cong. Globe, 39th Cong. 1st Sess. (1865) 2987. See also *Id.* at 1366 (Remarks of Senator Saulsbury), 2939 (Remarks of Congressman Pruyn), 2941 (Remarks of Congressman Wood), 2943 (Remarks of Congressman Highby), 2962 (Remarks of Congressman Holman), 2994 (Remarks of Senator Pendelton).

Congressman Rogers, opposing the 1866 Civil Rights Bill, the provisions of which were later codified in Section 1 of the Fourteenth Amendment, urged:

> "I ask you to stand by the law of the country and to regulate these Federal and State systems upon the grand principles upon which they were intended to be regulated, that we may hand down to those who are to

> come after us this bright jewel of civil liberty unimpaired; and I say that the Congress or men who will strip the people of these rights will be handed down to perdition for allowing this bright and beautiful heritage of civil liberty embodied in the powers and sovereign jurisdiction of the States to pass away from us." Cong. Globe, 39th Cong. 1st Sess. 1122-23. See also *Id.* at 604 (Remarks of Senator Cowan), 1415 (Remarks of Senator Davis), 1174 (Remarks of Congressman Rogers), 1156 (Remarks of Congressman Thornton).

Congressman Shanklin protested that the Fourteenth Amendment struck down "the reserved rights of the states." Cong. Globe, 39th Cong. 1st Sess. 1865-66. See also *Id.* at 2530 (Remarks of Congressman Randall), 2538 (Remarks of Congressman Rogers), 3147 (Remarks of Congressman Harding). Such objections, however, were to no effect, for such a restriction on state power and sovereignty was precisely the goal of the proponents of these measures who believed that the rights of the states ought not include "the right to defeat the very object for which all government is made .... to inflict wrongs on free citizens by a denial of the full protection of the laws." Cong. Globe, 42d Cong. 1st Sess. 84-85 App. (Remarks of Congressman Bingham).[4]

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[4] "From the beginning, the program for the protection of men in their civil rights encountered the destruction of federalism argument. The Thirteenth Amendment, the first constitutional expression of that program, was proposed, encountered the federalism objection, and was adopted anyway. Next, the civil rights bill, designed to implement the Thirteenth Amendment, had heaped upon it the same charge. It was adopted notwithstanding. Then, at last, came the Fourteenth Amendment, created to accomplish what the Thirteenth Amendment had been designed to do but had failed to do because of the continuation of the federalism objection, intended to remove from the Civil Rights Act the constitutional doubts arising from the federalism objection to it. The Fourteenth Amendment was itself, in turn, subjected to the very same criticisms. Despite that criticism, it too was adopted." ten Broek, *Equal Under Law*, 219-220 (1965).

The Reconstruction Amendments created precisely the circumstance in which Iredell and Hamilton had agreed immunity had no place, by stripping the states of their hitherto existing sovereign power to sanction slavery, deny equal protection or due process of the laws, or abridge the right to vote on account of race. In the limited areas prescribed by these Amendments the states have no authority, the free exercise of which can be protected from litigation, and in such a case the purpose underlying sovereign immunity and the Eleventh Amendment cannot be served.

C. The purposes of sovereign immunity and the Eleventh Amendment are inconsistent with the purposes of the Reconstruction Amendments:

While sovereign immunity was properly conceived as no more than an incident to sovereignty itself, the grant of immunity, particularly within a federal system, reflected a number of policies other than the mere protection of sovereignty itself. The policies which immunity would advance are, however, the very policies expressly rejected by Congress when it approved the Thirteenth, Fourteenth and Fifteenth Amendments.

Non-reliance on state enforcement:

Advocates of sovereign immunity both before and after passage of the Eleventh Amendment urged that judicial jurisdiction over claims against a sovereign was unnecessary because the King, or the executive and legislative branches of a state government, could and would do justice in any case brought to their attention. In England, Iredell argued, while the resolution of such grievances was technically at the discretion of the crown, it was the King's practice, through the Chancellor, to do whatever justice required. "If any person has, in point of property, a just demand upon a King, he must petition him in his court of chancery, where

his chancellor will administer right, as a matter of grace, though not upon compulsion." *Chisholm v. Georgia,* 2 U.S. 419, 442 (1793). A citizen with a claim against a state, it was said, could rely on the legislature's good faith and sense of public duty. 2 U.S. at 445-6. Hamilton urged that contracts between a nation and an individual were binding, not in a court of law, but "on the conscience of the sovereign." *The Federalist,* No. 81. The argument was reiterated by Congressman Diven in 1862 urging retention of sovereign immunity by the federal government:

> "Now, sir, what is the theory with regard to the satisfaction of claims against Governments? Why it is this: that Governments are always disposed to deal justly with their subjects; that Governments are never required or compelled by legal process to render justice to their subjects; and that they are always ready to do right when the right is ascertained; and the only object of a Court of Claims should be to aid the Government in determining what is right, and then the Government will do right always. That is the theory of government. It was a maxim of the common law that "the King can do no wrong," and it is the theory that Governments can do no wrong, that exempts them from this trial in courts to compel them to do right to their own citizens. It is false in theory to suppose that when an individual has a just claim against the Government it is necessary for him to sue the Government in a court of law to recover it." Cong. Globe, 38th Cong. 1st Sess. 1672.

The Supreme Court, in *Hans v. Louisiana,* 134 U.S. 1 (1890), reasoned that a state could be relied on to respect "the highest demands of natural and political law to preserve justice," and that the security for state loans "is the plighted faith of the State." 134 U.S. at 16, 21.

When the Reconstruction Amendments and legislation were proposed, opponents objected that such measures were

unnecessary, and that reliance could be placed on the "honest purpose of the several States" to protect the rights of citizens. Cong. Globe, 39th Cong. 1st Sess. 1294 (Remarks of Congressman Wilson). The conclusion of the Congress and the nation, however, was to the contrary: in particular that the southern states could not be relied upon to respect and protect the rights of freedmen. Speaking in favor of the 1866 Civil Rights Act, whose principles were soon incorporated in Section 1 of the Fourteenth Amendment, Representative Wilson explained:

> "If the States would all observe the rights of our citizens, there would be no need for this bill ... If they would recognize that "general citizenship" ... which under this [privileges and immunities] clause entitles every citizen to security and protection of personal rights, ... we might safely withhold action. And if above all, Mr. Speaker, the States should admit, and practice the admission, that a citizen does not surrender these rights because he may happen to be a citizen of the State which would deprive him of them, we might, without doing violence to the duty devolved upon us, leave the whole subject to the States. But, sir, the practice of the States leaves us no avenue of escape, and we must do our duty by supplying the protection which the States deny." Cong. Globe, 39th Cong. 1st Sess. 1117-18.

Congressman Cook argued:

> "Suppose ... these States are restored to all the rights of sovereign States within this Union, and they carry out the same spirit they have already manifested toward these freedmen ... It is idle to say these men will be protected by the States. The sufficient and conclusive answer to that position I submit is, that those States have already passed laws which would now virtually reenslave them. ... Does any man in this House believe that these people can be safely left in these States

without the aid of Federal legislation or military power? Does anyone believe that their freedom can be preserved without this aid? If any man does so believe, he is strangely blind to the enactments passed by legislatures touching those freed men." *Id.* at 1124-25. See also *Id.* at 503 (Remarks of Senator Howard), 602 (Remarks of Senator Lane).

Six years of experience after the Civil War served only to confirm Congress' fears in this regard, and the 1871 Civil Rights Act, including the predecessor of Section 1983, was enacted "to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." *Monroe v. Pape,* 365 U.S. 171, 179 (1961). Congressman Shellabarger, the sponsor of the Act, urged:

> "To say that Congress can do no such thing as to make any laws so enforcing these rights, nor open the United States courts to enforce any such laws but must leave all the protection and law-making to the very states which are denying the protection, is plainly and grossly absurd." Cong. Globe, 42d Cong. 1st Sess., 68 App.

The "plighted faith of the States" – which the Supreme Court has found an adequate alternative to judicial enforcement of the contract clause in *Hans* – was expressly rejected as a sufficient guarantee of the rights of freedmen and others under the Reconstruction Amendments. Cong. Globe, 42d Cong. 1st Sess. 85 (Remarks of Congressman Bingham).

The Congress which approved the Thirteenth, Fourteenth and Fifteenth Amendments, had only a few years earlier ended the sovereign immunity of the federal

government. In his first State of the Union message, President Lincoln had urged abolition of that immunity:

> "It is important that some more convenient means should be provided, if possible, for the adjustment of claims against the Government especially in view of their increased number by reason of the war. It is as much the duty of Government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals. The investigation and adjudication of claims in their nature belong to the judicial department." Schlesinger and Israel, *The State of the Union Messages of the Presidents,* vol. 2, 1060 (1966).

The debates on this proposal centered on whether or not the federal government was already providing a prompt and just resolution of claims against it, the procedure until that time being for Congress to enact a special appropriation in the amount it felt fair. Proponents of immunity urged such justice was already being done, but a majority of the Congress concluded otherwise. Congressman Pendleton responded to the remarks of Congressman Diven quoted above:

> "My colleague on the committee has told us today that, in theory, the Government is always willing to do justice to the citizen, that it is always willing to do that which equity and justice requires it to do. Now, sir, that is very good in theory, but it is very bad in practice, and when that gentleman has had experience in examining the claims brought against this Government year after year ... he will find that there are innumerable claims on the calendar which have been examined and re-examined session after session. .. If the Government of the United States owes a debt to a citizen of the United States, why should that citizen be forced to come to Congress year after year, and spend his time and his money in besieging individual

> members, in order to show to them the justice of his claim, depending, in the end, even in the justest case, not upon its merits, but upon their patience to hear him fully, and their impartiality to judge fairly." Cong. Globe, 38th Cong. 1st Sess. 1675.

Congressman Bingham, the author of the Fourteenth Amendment, urged that the abolition of immunity would end the injustice of denying relief to citizens with legitimate grievances, and the corruption of the Congress by lobbyists pressing dubious claims. *Id.* at 1674. The statute conferring binding jurisdiction on the Court of Claims was enacted in 1863, 12 Stat. 765, and the remedies available to citizens broadened further in 1866. 14 Stat. 9.

The existence of a sovereign immunity defense in an action under the Reconstruction Amendments is manifestly incompatible with the purpose and background of those constitutional provisions. It cannot plausibly be urged that Congress first established a panoply of federal rights and remedies on the ground that the states would not voluntarily protect those rights, and yet intended to permit the states to avoid judicial enforcement of those rights on the grounds that the states would voluntarily protect such rights and that judicial enforcement was thus unnecessary. The same state legislature which enacted a discriminatory measure could hardly be expected, in response to the claims of its victims, to repeal that measure and appropriate funds to compensate them for any injuries suffered. Whatever support sovereign immunity may have commanded in the 1790's, by the 1860's Congress shared Lincoln's view that the courts were the most fair and efficient forums for resolving claims against the government.

Necessity of federal enforcement:

Federal jurisdiction over litigation against the states was opposed in the eighteenth century because of problems of enforcement which might arise. One of the great failings of

the Articles of Confederation was that under it the national government could carry out its desires and policies only through the action and good will of the states. If a state was not amenable to this process, the two levels of government were necessarily arrayed directly against each other, at best resulting in a cumbersome process and at worst threatening more serious conflict. The federalists sought to give the national government power to carry out its policies directly, rather than relying on or resorting to action against the states. It was to avoid the need to coerce the states into compliance that the new constitution was designed. Under a continuation of a confederacy, Hamilton warned, resort to such a military coercion was inevitable:

> "If there should not be a large army constantly at the disposal of the National Government, it would either not be able to employ force at all, when this could be done, it would amount to a war between parts of the Confederacy, concerning the infractions of a league; in which the strongest combination would be most likely to prevail, whether it consisted of those who supported, or those who resisted, the general authority. It would rarely happen that the delinquency to be redressed would be confined to a single member; and if there were more than one, who had neglected their duty, similarity of the situation would induce them to unite for common defense." *The Federalist,* No. 16.

But, Hamilton pointed out,

> "If the execution of the laws of the National Government should not require the intervention of the State Legislatures; if they were to pass into immediate operation upon the citizens themselves, the particular Governments could not interrupt their progress without an open and violent exertion of an unconstitutional power." *Id.*

Such affirmative efforts to obstruct enforcement of national laws were thought highly unlikely.

It was this same consideration which, for the federalists, militated against federal jurisdiction over the states. Hamilton himself pressed this argument in the oft quoted passage in *The Federalist* on the meaning of Article III of the proposed constitution:

> "To what purpose would it be to authorize suits against the States for the debts they owe? How could recovery be enforced? It is evident, it could not be done, without waging war against the contracting State, and to ascribe to the Federal Courts, by mere implication, and in destructing of a pre-existing right of the State Governments, a power which would involve such a consequence, would be altogether forced and unwarrantable." *The Federalist*, No. 81.

The fear that such jurisdiction over the states might lead to the use of force was, at the time, not unwarranted. In the face of *Chisholm*, the Georgia House of Delegates passed a statute making any effort by a federal marshal to enforce a judgment for Chisholm a felony punishable by death without benefit of clergy. Jacobs, *The Eleventh Amendment and Sovereign Immunity*, 56-57 (1972). In another private action in 1809 seeking to collect funds held by the heirs of the state treasurer of Pennsylvania, decided *sub nom. United States v. Peters*, 9 U.S. (5 Cranch.) 115 (1809), the governor deployed the state militia around the home of the heirs to prevent execution of the judgment. The United States marshal enlisted a posse, and an armed clash was averted only when the state relented in the face of direct threats by President Madison. Jacobs, *The Eleventh Amendment and Sovereign Immunity*, 77-80 (1972).

It cannot plausibly be maintained that those who framed the Reconstruction Amendments and civil rights

legislation would have opposed suits against the states on the ground that force might be required to enforce the resulting court orders. Throughout the period when these measures were being enacted the armed forces of the federal government, with the enthusiastic support of Congress, were stationed throughout the former rebel states and were deeply involved in administering and policing those areas. See Morrison, *The Oxford History of the American People*, 717-725 (1965). After a four-year Civil War of unprecedented cost, the willingness of the national government to resort to force to preserve the fruits of its victory cannot be doubted.

During the debates on the 1866 Civil Rights Bill, Congressman Thayer openly expressed this willingness:

> "Why have laws if Government has not the physical force and strength to enforce them? Enforce them if you can through the forms of judicial procedure and by the ordinary means at the command of judicial tribunals as this bill provides: but if there are combinations against the peaceful enforcement of these laws, why should not the military power of the United States, in pursuance of the express power given in the Constitution, come to the rescue of the civil power in order to enforce a law solemnly promulgated by the people of the United States?" Cong. Globe, 39th Cong. 1st Sess. 1153.

Senator Pool expressed the same conviction six years later in support of the 1871 Civil Rights Act regarding the constitutional guarantee of equal rights:

> "If the states shall fail to secure and enforce this right of the colored man, and deny to him protection in the free exercise of it as a citizen of the State, then the United States, by virtue of his national citizenship, must and will, by appropriate legislation, by all the power of its courts, by its land and naval forces,

> extend over him within the States the shield of the national authority. ... I yet hope it is possible to escape more violent means by a prompt resort to the ordinary federal tribunals of justice. Unless that resort be promptly and efficiently taken, there is no hope of escaping for another year the application of the most stringent and ruinous military measures." Cong. Globe, 42d Cong. 1st Sess. 609.

Both civil rights acts contained express provisions for resort to military rule if civil measures proved inadequate to protect the rights of the freedmen. See 14 Stat. 27, 17 Stat. 13.

To suggest that suits against the states under the Reconstruction Amendments should be forbidden to avoid problems of enforcement would be to ignore the fact that the Congresses which framed those provisions were determined to use whatever measures were necessary to enforce the rights described therein. Nor are suits against state officers any less likely to incur virulent state opposition; the history of the last century, particularly since *Brown v. Board of Education,* 347 U.S. 483 (1954), is studded with instances where extraordinary federal action was necessary to effectuate the decree of a federal court against such officers.

Remedial purpose of the Reconstruction Amendments:

The defense of sovereign immunity, if allowed in all cases, would operate in some circumstances to deny citizens an effective judicial remedy to enforce their rights. Undoubtedly there are circumstances under which such a normally incongruous situation might be appropriate. Where control of state conduct is not a primary concern of the provisions establishing those rights, it may be that subjecting the states to judicial control is too drastic a method of achieving a largely incidental purpose. Where there is little reason to doubt the states will voluntarily comply with the

federal requirements, Congress might conclude that harmonious federalism would best be served by trusting the states to act without threat of litigation. And where a fully effective means of enforcement less drastic than federal litigation is available, the necessity for such litigation might be doubted. See generally *Employees,* 411 U.S. 279 (1973).

None of these factors, however, are present here. Control of the states was not a merely incidental effect of the Reconstruction Amendments, it was the primary concern and goal. See *The Civil Rights Cases,* 109 U.S. 7 (1883). Enforcement of the Reconstruction Amendments has traditionally been left primarily in the hands of private litigants. See 42 U.S.C. §§1981-1983. Those amendments and the contemporaneous legislation were founded on the conviction that the states could not be relied on to voluntarily comply with the law. The men who framed those Amendments were primarily concerned, not with preserving the delicate balance of harmonious federalism, but with assuring compliance by the recalcitrant states through whatever means necessary.

The Supreme Court has long recognized the particular undesirability of leaving those asserting constitutional rights without an effective remedy. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, wherever he receives an injury." *Marbury v. Madison,* 1 U.S. (Cranch) 137, 163 (1803), quoted in *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 338, 397 (1971).

> "The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity. It would, indeed, be most unfortunate if the immunity of the individual states from suits by citizens of other states, provided for in the 11th Amendment, were to be interpreted as nullifying those other provisions which confer power on

> Congress to regulate commerce among the several states, which forbid the states from entering into any treaty, alliance, or confederation, from passing any bill of attainder, ex post facto law, of impairing the obligation of contracts or, without the consent of Congress, from laying any duty of tonnage, entering into any agreement or compact with other states, or from engaging in war, – all of which provisions existed before the adoption of the 11th Amendment, which still exist, and which would be nullified and made of no effect if the judicial power of the United States could not be invoked to protect citizens affected by the passage of state laws disregarding those constitutional limitations. Much less can the 11th Amendment be successfully pleaded as an invincible barrier to judicial inquiry whether the salutary provisions of the 14th Amendment have been disregarded by state enactments." *Prout v. Starr,* 188 U.S. 537, 543 (1903).

See also *General Oil Co. v. Crain,* 209 U.S. 211, 226-27 (1908); *Osborn v. The Bank of the United States,* 22 U.S. (9 Wheat.) 738, 849 (1824); Jacobs, *The Eleventh Amendment and Sovereign Immunity* 144 (1972).

That any rights arising under the Reconstruction Amendments should be without a remedy is particularly inappropriate since these Amendments, especially the Fourteenth, were primarily remedial. The abolitionists who finally won control of the Congress and many states in the 1860's and 1870's had long maintained that the rights described in the Thirteenth, Fourteenth and Fifteenth Amendments already existed, though not recognized, by virtue of the privileges and immunities clause and the Bill of Rights. See generally ten Broek, *Equal Under Law* (1965); Graham, *The Early Anti-slavery Backgrounds of the Fourteenth Amendment,* 1950 Wis. L. Rev. 479; Graham, *The "Conspiracy Theory" of the Fourteenth Amendment,*

47 Yale L.J. 371 (1938). Congressman Wilson, speaking in favor of the 1866 Civil Rights Bill explained:

> "Mr. Speaker, I think I may safely affirm that this bill, so far as it declares the equality of all citizens in the enjoyment of civil rights and immunities, merely affirms existing law. We are following the Constitution. We are reducing to statute form the spirit of the Constitution. We are establishing no new right, declaring no new principle. It is not the object of this bill to establish new rights, but to protect and enforce those that already belong to every citizen." Cong. Globe, 39th Cong. 1st Sess. 1117.

Section 1 of the Fourteenth Amendment, according to Congressman Bingham who drafted it, was not to create new substantive rights at the expense of the states:

> "[T]his amendment takes from no State any right that ever pertained to it. No State ever had the right, under forms of law or otherwise, to deny to any freed man the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy." *Id.* at 2452.

The problem to which these Amendments and related legislation were addressed was the unenforceability of these rights. As Congressman Bingham detailed, in support of the 1871 Civil Rights Act,

> "The States did deny to citizens the equal protection of the laws, they did deny the rights of citizens under the Constitution, and except to the extent of the express limitations upon the States, as I have shown, the citizen had no remedy. They denied trial by jury, and he had no remedy. They took property without compensation, and he had no remedy. They restricted the freedom of the press, and he had no remedy. They

> restricted the freedom of speech, and he had no remedy. They restricted the rights of conscience, and he had no remedy. They bought and sold men who had no remedy." Cong. Globe, 42d Cong. 1st Sess. 85 App.

It was to create such a federal remedy for the aggrieved citizen — not for the Attorney General — that the Reconstruction Amendments were enacted. See *Monroe v. Pape,* 365 U.S. 167 (1961).

It would be incongruous if the states were able to deny such a remedy by closing "portions" of such litigation to the federal courts. One of the discriminatory practices of particular concern to Congress after the Civil War was state legislation forbidding Blacks to institute litigation or testify in state courts. *Monroe v. Pape,* 365 U.S. at 176-178 (1961); ten Broek, *Equal Under Law,* 187n, 191n, 192 (1965). This denial of justice was particularly opprobrious when the basic rights were involved. As Bingham urged even before the Civil War regarding the privileges and immunities clause,

> "This guarantee of the Constitution of the United States is useless and a mockery, if it does not limit State sovereignty and restrain each and every state from closing its territory and its courts of justice against citizens of the United States." ten Broek, *Equal Under Law,* 333-34 (1965).

Proponents of the Amendments rejected the suggestion that, because of considerations of federalism, federal "courts must be closed to the appeal of our citizens." Cong. Globe 39th Cong. 1st Sess. 1924 (Remarks of Congressman Shellabarger). That the states should be able to close the federal courts to civil rights litigation is particularly inappropriate since, in most cases, the states have long ago opened their courts to litigation against themselves arising out of loans or other commercial activities.

The manifest desire of Congress in framing the Reconstruction Amendments was to exercise all its power to create an effective remedy and to withdraw from the states any power to defeat or prevent enforcement of certain basic rights. Congressman Bingham denied that the states had the right to deny constitutional rights "under any pretext whatever." Cong. Globe, 39th Cong. 1st Sess. 1088. Congressman Lawrence declared:

> "There are certain absolute rights which pertain to every citizen, which are inherent, and of which a state cannot constitutionally deprive him. But not only are those rights inherent and indestructible, but the means whereby they may be possessed and enjoyed are equally so." *Id.* at 1833.

The plethora of unprecedented legislation in the decade after the Civil War is ample evidence of the willingness of the Congress, in the words of one Senate critic, "to overturn the whole Constitution in order to get at a remedy for these people." *Id.* at 499 (Remarks of Senator Cowan). By the time the Civil Rights Act of 1871 was debated, the dispute within Congress was no longer over what type of judicial remedy to afford. Liberals and conservatives agreed that vindication of constitutional rights should be sought first from the federal judiciary, where the complainant was to be afforded "all the power of its courts." See Cong. Globe, 42d Cong. 1st Sess. 578 (Remarks of Senator Trumbull), 609 (Remarks of Senator Pool). The debate centered over what further remedies, such as martial law, Congress should provide if all the powers which could be conferred upon the courts were exhausted and found wanting. Congress can hardly have intended to deny the federal courts the authority, when needed, to entertain suits against the states, for such a limitation would have increased the need for resort to drastic extrajudicial measures which northerners and southerners alike wished to avoid.

Under these circumstances the existence of a sovereign

immunity defense in litigation under the Reconstruction Amendments is entirely incompatible with the rights protected by those Amendments. The policies and assumptions of fact which underlie sovereign immunity are precisely the policies and assumptions rejected by Congress in the decade following the Civil War when the Fourteenth Amendment was adopted. A decade ago this Court summarily and unanimously rejected similar contentions – and upheld sweeping relief and "impact" – in *Griffin v. School Board of Prince Edward County*, 377 U.S. 218, 228 (1964). Sovereign immunity is a discredited doctrine, yet it has been woven into the Eleventh Amendment–which was also passed in response to state antagonism to suits by individuals to force payment of war-related and commercial debts. To the degree necessary, the Eleventh must be limited by the ultimate supremacy of federal law – and by the rule of law in a modern society committed to enforce rights to Equal Protection under the Fourteenth Amendment.

Conclusion

For the foregoing reasons, the judgment of the Second Circuit Court of Appeals should be reversed and the case remanded to the District Court for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-251

GARLAND M. FITZPATRICK, ET AL.,
DONALD MATTHEWS, ET AL.,
Plaintiffs
Petitioners

v.

FREDERICK BITZER, CHAIRMAN, ET AL.,
Respondents

BRIEF FOR RESPONDENTS

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February 19, 1976

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BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the Court of Appeals of June 2, 1975 is reported at 519 F.2d 559. The opinion of the District Court of September 16, 1974 is reported in 390 F.Supp. 278 (D. Conn. 1974). Both opinions were printed in the appendix of respondent Bitzer in his Petition for Writ of Certiorari in No. 75-283 (hereinafter App. as distinguished from the Appendix, hereinafter A).

JURISDICTION

The judgment of the Court of Appeals was entered on June 2, 1975. Jursidiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Does the Eleventh Amendment prohibit a federal court from awarding back pay monetary relief against a state, in favor of employees of that state who established that they were victims of discriminatory state laws which violated Title VII of the 1964 Civil Rights Act as amended in 1972?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution provides:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Article 1, Section 8, Clause 3 to the Constitution provides

that the Congress shall have the Power . . . "To regulate Commerce . . . among the several States . . ."

STATEMENT OF THE CASE

The Respondents accept the Petitioners' statement of the case.

SUMMARY OF ARGUMENT

The Eleventh Amendment to the Constitution of the United States as a bar to the awarding of retrospective damages by a federal court against a state. The doctrine of *Ex Parte Young* states that the Eleventh Amendment is not a bar to a suit to enjoin enforcement by a state officer of an unconstitutional state statute. However, *Ex Parte Young* is not authority for a retroactive award of monetary damages payable out of the State treasury. This Court, in *Edelman* v. *Jordan*, held such a retroactive award of monetary relief in favor of a private person against a state by a federal court was prohibited by the Eleventh Amendment.

The State of Connecticut has not waived its immunity under the Eleventh Amendment. This Court has held that a waiver must be in the clearest language and that constructive consent is not a doctrine commonly associated with the surrender of constitutional rights.

The Petitioners' arguments are not, in fact, supported by law. The Petitioners in actuality propose that Congress has the power to withdraw the Eleventh Amendment. They further argue that the Fourteenth Amendment has limited the State's Eleventh Amendment immunity. They fail to recognize that it is the duty of the courts to reconcile and give effect to both amendments insofar as is possible.

ARGUMENT

I.

THE ELEVENTH AMENDMENT BARS THE GRANTING OF RETROSPECTIVE MONETARY DAMAGES AGAINST THE STATE BY A FERERAL COURT.

Mr. Justice Marshall and Mr. Justice Stewart, in concurring with the majority opinion in *Employees of Dept. of Health and Welfare* v. *Missouri*, 411 U.S. 279, 93 S.Ct. 1614 (1973) briefly reviewed the subject of a state's immunity to suit and wrote:

> "Sovereign immunity is a common-law doctrine that long predates our Constitution and the Eleventh Amendment, although it has, of course, been carried forward in our jurisprudence. [footnote omitted]. While the present-day immunity of a state from suit by its own citizens or by citizens of another State in the absence of consent cannot be justified on the common-law rationale that 'the King can do no wrong,' the principle has been said to be applicable to the states because of '[t]he inherent nature of sovereignty,' Great Northern Life Insurance Co., v. Read, 322 U.S. 47, 51, 64 S.Ct. 873, 875, 88 L.Ed. 1121 (1944). See also Kawanana Koa v. Polyblank, 205 U.S. 349, 353, 27 S.Ct. 526, 527, 51 L.Ed 834 (1903).
>
> "The common-law doctrine of sovereign immunity in its original form stood as an absolute bar to suit against a State by one of its citizens, absent consent. But that doctrine was modified pro tanto in 1788 to the extent that the States relinquished their sovereignty to the Federal Government. At the time our union was formed, the States, for the good of the whole, gave certain powers to Congress, including power to regulate commerce, and by so doing they simultaneously subjected to Congressional control that portion of their pre-existing common-law sovereignty which conflicted with those supreme powers given over to Congress.
>
> This is one of the essential lessons of the decision in Parden v. Terminal R. Co., 377 U.S. 184, 192, 84 S.Ct. 1207, 1212, 12 L.Ed. 233 (1964), where the Court recognized that '[b]y empowering Congress to regulate commerce . . . the States necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation.' Congress having validly exercised its power under the commerce clause to extend the protection of the FLSA to state employees such as petitioners, see Maryland v. Wirtz, 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed. 2d 1020 (1968), the State may not defeat this suit by retreating behind its common law shield of sovereign immunity." *Id.*, 411 U.S. at 288, 93 S.Ct. at 1619.

In *Edelman* v. *Jordan*, 415 U.S. 651, 662 94 S.Ct. 1347, 1358 (1974) this Court, while examining the history of the Eleventh Amendment, stated:

> "While the Amendment by its terms does not bar suits against a state by its own citizens, this Court has consistently held that an unconsenting state is immune from suits brought in Federal courts by her own citizens as well as by citizens of another state. Hans v. Louisiana, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890); Duhne v. New Jersey, 251 U.S. 311 40 S.Ct. 154, 64 L.Ed. 280 (1920); Great Northern Life Insurance Co. v. Read, 322 U.S. 47, 64 S.Ct. 873, 88 L.Ed. 1121 (1945); Parden v. Terminal R. Co., 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed. 233 (1964); Employees v. Department of Public Health and Welfare, 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed. 2d 251 (1973). It is also well established that even though a State is not named a party to the action, the suit may

nonetheless be barred by the Eleventh Amendment. In Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389 (1945), the Court said:

'[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.' *Id.*, at 464, 65 S.Ct., at 350.

"Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment. Great Northern Life Insurance Co. v. Read, supra; Kennecott Copper Corp. v. State Tax Comm'n., 327 U.S. 573, 66 S. Ct. 745, 90 L.Ed. 862 (1946)."

In *Fitzpatrick* v. *Bitzer*, 519 F.2d 559 (2d Cir. 1975) the Court of Appeals, after reviewing the history of the Eleventh Amendment, continued:

> "On the other side of the coin, the Eleventh Amendment does not bar a suit to enjoin enforcement by a state officer of an unconstitutional state statute. Ex Parte Young, 209 U.S. 123 (1908). The Court, in reaching this result, relied on the common law principle that a state officer acting illegally is deemed to act 'without the authority of' the state and therefore outside its shield of sovereign immunity. 209 U.S. at 159-60. Furthermore, although the Eleventh Amendment shields the state against a retroactive award of monetary damages payable out of the state treasury as compensation for its past breach of a legal duty, a judgment requiring a state to expend some public funds in connection with obtaining or implementing injunctive relief against it is permissible, even though the award in such a case has 'an ancillary effect on the state treasury'. Edelman v. Jordan, 415 U.S. 651, 688 (1974); Jordan v. Fusari, 496 F.2d 646, 651 (2d Cir. 1974)." *Fitzpatrick* v. *Bitzer, supra,* App. 33a.

This Court, in *Edelman,* stated that, as in most areas of the law, the difference between the type of relief barred by the Eleventh Amendment and that permitted under *Ex Parte Young,* 209 U.S. 123 (1908) will not, in many instances, be that between night and day. *Supra* at 667, 94 S.Ct. at 1357. However, the difference presented for this Court's consideration in the matter presently before it is not gray at all. In this case we have the petitioners seeking an award of back pay against a state.

This Court, in *Edelman,* held that such retroactive award of monetary relief against a state was in contravention of the Eleventh Amendment.

"But that portion of the district court's decree which petitioners challenge on Eleventh Amendment grounds goes much further than any of the cases cited. It requires payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal question determination, but as a form of compensation to those whose applications were processed on the slower time schedule at a time when petitioners were under no court-imposed obligation to conform to a different standard. While the Court of Appeals described this retroactive award of monetary relief as a form of 'equitable restitution,' it is in practical effect indistinguishable from an award of damages against the state. It will to a virtual certainty be paid from state funds, and not from the pocket of the individual state official who was the defendant in this action. It is measured in terms of a monetary loss resulting from a past breach of a legal duty on the part of the defendant state officials.

"Were we to uphold this portion of the District Court's decree, we would be obligated to overrule the Court's holding in Ford Motor Co. v. Department of Treasury, supra. There a taxpayer, who had, under protest, paid taxes to the State of Indiana, sought a refund of those taxes from the Indiana State officials who were charged with their collection. The taxpayer claimed that the tax had been imposed in violation of the United States Constitution. The term 'equitable restitution' would seem even more applicable to the relief sought in that case, since the taxpayer had at one time had the money, and paid it over to the state pursuant to an allegedly unconstitutional tax exaction. Yet this court had no hesitation in holding that the taxpayer's action was a suit against the state and barred by the Eleventh Amendment. We reach a similar conclusion with respect to the retroactive portion of the relief awarded by the District Court in this case." *Id.*, at 668, 94 S.Ct. at 1358.

In *Anderson* v. *Tennessee Office of Economic Opportunity*, 384 F.Supp. 788, 790 (M.D. Tenn. 1974) wherein the District Court correctly implemented *Edelman*, the District Court wrote:

> ". . . The history of the Eleventh Amendment is rather complex and confusing. [footnote omitted]. The force of the Eleventh Amendment has been eroded considerably by the use of two legal fictions: (1) suing the state's officials, rather than the state itself, and (2) finding that the state has waived its immunity or consented to the suit.
>
> "The legal fiction of suing the state's officials germinated in the controversial case of Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), where the Supreme Court held that where

> '[t]he act to be enforced is alleged to be unconstitutional . . . the use of the name of the state to enforce an unconstitutional act to the injury of complainants is a proceeding without the authority of, and one which does not affect, the state in its sovereign or governmental capacity.'
>
> "However, even where the fiction of suing the state officials, rather than the state itself, successfully avoids an Eleventh Amendment bar to the suit, it has been held that only prospective injunctive relief can be granted, absent the presence of waiver or consent by the state. Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed. 2d 662 (1974). See also, Jordan v. Gilligan, 500 F.2d 701 (6th Cir. 1974), and Taylor v. Perini, 503 F.2d 899 (6th Cir. 1974). The Edelman court, overturning a judgment which ordered retroactive payment of public aid benefits wrongfully withheld by state officials, quoted with approval from Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389 (1945):
>
> '[W]hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants.' At 464, 65 S.Ct. at 350, 89 L.Ed. at 394.
>
> "The Edelman court disapproved the Eleventh Amendment holdings of prior cases 'to the extent that they are inconsistent with our holding today.' Included in this disapproval was the case of Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed. 2d 600 (1969), which allowed retroactive payment of welfare benefits found to have been unlawfully withheld because of residence requirements which were held violative of equal protection.

"From the foregoing, it would appear that the Eleventh Amendment bars the way to the recovery in federal court of any retroactive benefits or attorney's fees under 42 U.S.C. § 2000e, unless waiver or consent to suit can be found. As the Supreme Court said in Employees v. Missouri Public Health Department, 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed. 2d 251 (1973): 'The history and tradition of the Eleventh Amendment indicate that by reason of that barrier a federal court is not competent to render judgment against a nonconsenting State.' At 284, 93 S.Ct. at 1617."

II.

THE STATE OF CONNECTICUT HAS NOT WAIVED ITS IMMUNITY UNDER THE ELEVENTH AMENDMENT.

The Constitution of the State of Connecticut, Eleventh Article, Section 4, states:

> "Claims against the state shall be resolved in such manner as may be provided by law."

It cannot be argued that this constitutional provision is a waiver of the Eleventh Amendment to the Constitution of the United States. It grants the General Assembly of the State of Connecticut the authority to determine if, when and how claims against the state shall be made.

The General Assembly has adopted several statutes which permit the institution of actions against the state or against certain state officials. None of these statutes is applicable in the matter presently before the Court.

One of the areas in which claims against the State of Connecticut may be resolved is set forth in Chapter 53 of the

Connecticut General Statutes entitled "Claims Against The State". This statute specifically excludes "claims for the periodic payment of disability, pension, retirement or other employment benefits". Sec. 4-142 Conn. Gen. Stat., as amended.

The cause of action now before this court was based upon certain claims for retirement benefits. The statute authorizing the appointment of the Claims Commissioner for the State of Connecticut specifically excludes the consideration of claims concerning retirement benefits from the jurisdiction of the Claims Commissioner.

The deliberate exclusion of this area from the jurisdiction of the official empowered to hear claims and to authorize the institution of actions against the state, must be considered to be a positive refusal by the state to waive its immunity in all areas not specifically waived by the statute.

Assuming even that the passage of Chapter 53 of the Connecticut General Statutes does not serve to state that the State of Connecticut has not waived its Eleventh Amendment immunity, it is not necessary for a state legislature to pass a statute or resolution which will specifically cry out "Know Ye All Men by these presents that the State of Connecticut does hereby refuse to waive its immunity under the Eleventh Amendment of the Constitution of the United States of America".

It is almost axiomatic that in the construction of statutes a state agency has no authority other than that granted it by statute or by necessary implication. It follows that the actions of the state are read in its statutes or by necessary implication. Thus, a state legislature must speak in the clearest of terms when the decision is being made to waive the immunity of the state.

A waiver must not only be clearly intended as a waiver, but there must be an appropriation of funds to implement the waiver. Any waiver of Eleventh Amendment immunity without an appropriation to permit the payments involved is an incomplete act and should not be considered as an absolute waiver.

This Court has stated that in determining whether a state has waived its constitutional protection under the Eleventh Amendment, it would require that the waiver be in the clearest possible language and that it would not adopt a ruling by which it is found that a state constructively consented to the institution of a suit.

> ". . . Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here. In deciding whether a state has waived its constitutional protection under the Eleventh Amendment we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as will leave no room for any other reasonable construction.' Murray v. Wilson Distilling Co., 213 U.S. 151, 171, 29 S.Ct. 458, 464, 53 L.Ed. 742 (1909). We see no reason to retreat from the Court's statement in Great Northern Insurance Co. v. Read, 322 U.S. 47, 54, 64 S.Ct. 873, 877, 88 L.Ed. 1121 (1945) (footnote omitted). '[W]hen we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration to a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found.'" *Edelman* v. *Jordan, supra,* at 673, 94 S.Ct. at 1360. See also, *Smith* v. *Reeves,* 178 U.S. 436, 20 S.Ct. 919 (1899); *Chandler* v. *Dix,* 194 U.S. 590, 24 S.Ct. 766 (1903); *Great Northern Life Insurance Co.* v. *Read,* 322 U.S. 47, 64 S.Ct. 873 (1944); *Richin* v. *Industrial Construction Inc.,* 502 F.2d 1051, 1055 (10th Cir. 1974).

Chapter 53, Connecticut General Statutes, does not state that the State of Connecticut consents to suit in the federal courts. There is no statutory indication that Connecticut has waived its right to raise the protection of the Eleventh Amendment; a waiver of Connecticut immunity from suit must be effected only by express action of the Connecticut General Assembly. *Fidelity Bank & Trust Co.* v. *State of Conn.,* 166 Conn. 251, 255, —— A.2d ——, (1974); *Bergner* v. *State,* 144 Conn. 282, 286, 130 A.2d 293 (1957). Chapter 53 merely provides a procedure for obtaining authorization to sue the state in the state courts only.

The fact that when the State of Connecticut deems it appropriate it waives its sovereign immunity "by the most express language" is admirably demonstrated by § 52-556, Connecticut General Statutes, which states:

> "Any person injured in person or property through the negligence of any state official or employee when operating a motor vehicle owned and insured by the state against personal injuries or property damage shall have a right of action against the state to recover damages for such injury."

There is no Connecticut General Statute or Resolution of the State Legislature stating that the State of Connecticut has waived its immunity under the Eleventh Amendment of the Constitution of the United States.

The court below, in determining that the State of Connecticut had not waived the Eleventh Amendment or consented to the institution of the action by the adoption of the Fourteenth Amendment, stated:

> "Although we must conclude that Congress authorized private damage suits against the states for violation of Title VII, we reject any suggestion that an inference of

voluntary waiver or consent may be drawn from the state's mere continuance of its governmental function of hiring employees to perform state duties and of providing for their working conditions, including retirements. It is obvious that Connecticut, which had engaged in these activities as an essential part of its functions long before Title VII was amended to include the states, would, regardless of the amendment, have no choice but to continue doing so thereafter or cease functioning as a state. Thus no basis exists for finding voluntary waiver. Cf. Fay v. Noia, 372 U.S. 391, 439 (1963); Johnson v. Zerbst, 304 U.S. 458 (1938). See Note, Private Suits Against States in Federal Courts, 33 U. Chi. L.Rev. 331, 336 (1966). Although its continued engagement in these activities might conceivably be labelled a 'constructive' consent, the Supreme Court in Edelman v. Jordan, 415 U.S. 651, 673 (1974), stated that '[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here.'

"Parden v. Terminal Ry. Co., 377 U.S. 184 (1964), relied upon by plaintiffs, is clearly inapposite. There the State of Alabama, in face of the fact that interstate railroads were subject to the Federal Employees Liability Act, 45 U.S.C. §§ 51, et seq., and had been subjected to extensive regulation by Congress, see California v. Taylor, 353 U.S. 553 (1957) (state-owned railroad subject to Railway Labor Act); United States v. California, 297 U.S. 175 (1936) (same subject to Federal Safety Appliance Act), undertook the operation of such a railroad, which was essentially a proprietary business. In these circumstances a finding of voluntary waiver of constitutional immunity from suit was fully justified. No such situation exists here.

Connecticut's employment of its employees and adoption of a retirement system had long predated Title VII." *Fitzpatrick* v. *Bitzer, supra,* App. 41a.

III.

PETITIONERS' ARGUMENTS ARE NOT SUPPORTED BY LAW.

The petitioners argue that Congress intended to authorize suits for employment discrimination by state employees against states, together with all equitable remedies, including back pay. He states that *Employees* v. *Dept. of Public Health and Welfare,* 411 U.S. 279, 93 S.Ct. 1614 (1973) has been "overruled" by Congress. We note merely that Congress has no power to withdraw the Eleventh Amendment immunity from the states.

The petitioners argue that recent decisions of this Court indicate that a state may be rendered liable to suit in federal court and that the appropriate circumstances are present in this case. Petitioners cite as authority *Heart of Atlanta Motel* v. *United States,* 379 U.S. 241, 85 S.Ct. 348 (1964); *Katzenbach* v. *McClung,* 379 U.S. 294, 85 S.Ct. 377 (1964); *Petty* v. *Tennessee-Missouri Bridge Commission,* 359 U.S. 275, 79 S.Ct. 785 (1959); and *Parden* v. *Terminal R. Co.,* 377 U.S. 184, 84 S.Ct. 1207 (1964). Each case is not applicable in the matter presently before the Court. The State of Connecticut was not engaged in any profit making venture or any activity which could be reached by stretching the Commerce clause. The State was engaged in the every day business of a sovereign: It was governing, it was hiring, and it was paying its employees who are necessary in fulfilling its function as a sovereign.

IV.

THE ENACTMENT OF THE FOURTEENTH AMENDMENT HAS NOT LIMITED THE STATE'S ELEVENTH AMENDMENT IMMUNITY TO THE EXTENT THAT IT PERMITS AN ORDER FOR RETROSPECTIVE DAMAGES TO BE AWARDED AGAINST A STATE.

The petitioners argue that the State, by adopting the Fourteenth Amendment, has repealed or waived the Eleventh Amendment and further argue that *Edelman* does not decide the present case.

The United States Court of Appeals in deciding *Fitzpatrick* v. *Bitzer* stated:

"To the extent that a tension exists between enforcement of rights under the Fourteenth and the state's immunity under the Eleventh, our duty is to reconcile and give effect to both amendments insofar as possible. See Prout v. Starr, 188 U.S. 537, 543-44 (1903). Observing that 'particularly after the Civil War, Congress undertook to make federal courts the primary guardians of constitutional rights,' Justice Brennan in his separate opinion in Perez v. Ledesma, 401 U.S. 82, 106 (1971), recognized that 'Ex Parte Young was the culmination of efforts by this Court to harmonize the principles of Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution.' Edelman v. Jordan, supra, must be read as reaffirming the necessity of maintaining this balance between enforcement of individual constitutional rights and protection of the state's fiscal administration under the Eleventh. See 415 U.S. at 666-69; The Supreme Court, 1973 Term, 88 Harv. L.Rev. 41, 247 (1974).

"This desirable balance should not be upset in the context of suits to enforce Fourteenth Amendment rights unless other means that might be made available for enforcement of rights under that Amendment are so ineffective that Congress, in promulgating the Fourteenth Amendment after its adoption by more than three-quarters of the Union, necessarily implied that the Eleventh Amendment's remedial bar to a damage action against a state must yield. There is no reason to find such a necessary implication, however, since Congress, under the balance as reaffirmed in Edelman, has at its disposal various methods other than private federal damage suits for enforcing Fourteenth Amendment rights.

"The prospective injunctive relief available under Ex Parte Young, if it stood alone, should offer adequate relief as a remedy for enforcement of Fourteenth Amendment rights against the states. However, other remedies either are or may be made available. The Eleventh Amendment presents no bar to a suit by the United States against a state, United States v. Mississippi, 380 U.S. 128 (1965). Congress can authorize a suit by the federal government on a private plaintiff's behalf and it has done so in Title VII. See 42 U.S.C. § 2000e-5(f)(1). A suit by the United States against a state to recover back benefits on behalf of persons protected by a federal statute is permissible. Brennan v. State of Iowa, 494 F.2d 100, 104 (8th Cir. 1974); see Department of Employment v. United States, 385 U.S. 355 (1966).

"Furthermore, although Congress did not suggest that jurisdiction over private actions under Title VII extends to state courts, it might have done so. State courts would have faced no constitutional barrier to granting the retrospective damage relief Congress authorized since they are free from the limitations of the Eleventh Amendment,

which restrict only federal judicial power. We need not consider whether Congress could, consistently with the Tenth Amendment, compel a state to permit its citizens to enforce their Fourteenth Amendment rights against it in its courts except to note that under the Supremacy Clause and the general principle that state courts are co-equal partners with the federal courts in the enforcement of federal law, see Employees v. Department of Public Health and Welfare, 411 U.S. 279, 298 (Marshall, J., concurring); Martin v. Hunter's Lessee, 1 Wheat, 304, 339-50 (1816), state courts have been obligated to entertain congressionally-authorized private suits where state court jurisdiction extends to suits of the same character, see Testa v. Katt, 330 U.S. 386 (1947).

"Thus there is no reason in this case to depart from the balance between the Eleventh Amendment and other constitutional interests which was most recently reaffirmed in Edelman. In any event it may not still be open to this court to accept plaintiffs' invitation to disregard the Eleventh Amendment in Fourteenth Amendment cases. While Justice Marshall's dissent in Edelman suggested that the Supreme Court had not decided whether the Eleventh Amendment is limited by the later enactment of the Fourteenth, 415 U.S. at 694 n.2, the majority in that case expressly overruled Shapiro v. Thompson, 394 U.S. 618 (1969), State Department of Health and Rehabilitative Services v. Zarate, 407 U.S. 918 (1972) (per curiam), and Wyman v. Bowens, 397 U.S. 49 (1970) (per curiam), all cases involving Fourteenth Amendment causes of action, insofar as those cases allowed assessment of retroactive damages against the state. 415 U.S. at 670-71. See also Wilkerson v. Meskill, 501 F.2d 297 (2d Cir. 1974), in which this court affirmed per curiam on the basis of Edelman a dismissal of plaintiff's claims to back wages from the state based on equal protection and due

process, although without considering the arguments presented here. Further see Skehan v. Board of Trustees, 501 F.2d 31, 42 n.7 (3d Cir. 1974); Burton v. Waller, 502 F.2d 1261, 1273 (5th Cir. 1974), cert. denied, 43 U.S.L.W. 3474 (U.S. No. 74-875 Mar. 4, 1975)." *Fitzpatrick v. Bitzer, supra,* App. 44a.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the court below concerning the retroactive payment of monetary damages be sustained.

Respectfully submitted,

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Supreme Court, U. S.
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Nos. 75-251 and 75-283

In the Supreme Court of the United States

OCTOBER TERM, 1975

GARLAND M. FITZPATRICK, ET AL., PETITIONERS

v.

FREDERICK BITZER, ET AL.

FREDERICK BITZER, ET AL., PETITIONERS

v.

DONALD MATTHEWS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75–251

GARLAND M. FITZPATRICK, ET AL., PETITIONERS

v.

FREDERICK BITZER, ET AL.

No. 75–283

FREDERICK BITZER, ET AL., PETITIONERS

v.

DONALD MATTHEWS, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTIONS PRESENTED

1. Whether Congress is empowered by the Fourteenth Amendment to authorize the granting of monetary awards in suits by private individuals against state officials for alleged employment discrimination.

2. Whether, if the private plaintiffs prevail in such a suit, the Eleventh Amendment bars an award to them of reasonable attorney's fees as part of the costs.

INTEREST OF THE UNITED STATES

The United States has equal employment opportunity enforcement responsibility under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. 2000e, *et seq.* In particular, the Attorney General has authority under Sections 706(f) and 707 of the Act, 42 U.S.C. (Supp. IV) 2000e–5(f) and 2000e–6, to bring civil actions against state and local governments and governmental agencies which have allegedly engaged in unlawful employment practices. Resolution of the question whether private individuals may recover retroactive benefits against state governments will substantially affect the Attorney General's enforcement responsibilities. The magnitude of those responsibilities will also be affected by whether private plaintiffs may be awarded attorney's fees, since the private right of action is "an essential means of obtaining judicial enforcement" of civil rights statutes. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 45; *Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 209.

STATEMENT

1. Petitioners [1] are present and past male employees of the State of Connecticut. They brought this class action in the district court, alleging that certain provisions of the State's statutory scheme for the retirement of its employees discriminated against men on

[1] For convenience, we refer to the petitioners in No. 75-251—the plaintiffs below—as "petitioners." References to the "petition" are to their petition and references to the "cross-petition" are to the petition filed in No. 75-283 by the state officials, defendants below.

account of their sex, in violation of Title VII of the Civil Rights Act of 1964. The district court ruled in their favor, holding that the Connecticut State Employees' Retirement Act violates Title VII's prohibition against sex-based discrimination in employment insofar as it allows female employees having 25 or more years of state service the right to retire five years earlier than similarly situated male employees, and accords female employees with less than 25 years of service greater retirement benefits than similarly situated male employees (Cross-Pet. App. 2a–25a).[2]

The court enjoined the defendant state officials from continuing to operate the State's retirement scheme in a sexually discriminatory manner (*id.* at 24a), but it denied petitioners' requests for an award of retroactive retirement benefits to compensate them for financial losses suffered as a result of the state's discriminatory practices, and for an award of reasonable attorney's fees as a part of the costs (*id.* at 20a–23a). The court ruled, in effect, that application here of the express statutory authorization for both the monetary relief requested and awards of attorney's fees (Section 706(g) and (k), 42 U.S.C. (Supp. IV) 2000e–5(g) and 42 U.S.C. 2000e–5(k)) would violate the Eleventh Amendment (*id.* at 23a).

[2] In particular, the court found that four of the petitioners now employed by the State would not normally be able to retire until five years after similarly situated female employees, and that two of the petitioners, now retired from state employment, receive less in retirement benefits than similarly situated females (Cross-Pet. App. 10a–11a). The applicable state provisions are described in some detail in the district court's opinion (*id.* at 6a–7a).

2. On petitioners' appeal,[3] the court of appeals affirmed in part and reversed and remanded in part (Pet. App. 1a–24a). It held that, although Congress intended to authorize the district courts to award back pay or other retroactive monetary relief against state employers in actions brought by private individuals under Title VII (*id.* at 14a–17a), such relief is barred by the Eleventh Amendment (*id.* at 17a–23a). The court ruled that the power of Congress to enforce the Fourteenth Amendment does not include the power to subject the states to "a private federal action for retroactive damages" (*id.* at 19a), at least when "Congress * * * has at its disposal various methods other than private federal damage suits for enforcing Fourteenth Amendment rights" (*id.* at 20a).[4]

The court of appeals held that there was no constitutional barrier to an award of attorney's fees, however, since such an award would have only an "ancillary effect" on the state treasury of the kind permitted under *Edelman* v. *Jordan,* 415 U.S. 651, 667–668. Accordingly, the court remanded the case to the district court for a determination whether and to what extent attorney's fees should be allowed (*id.* at 24a).

[3] The state officials did not appeal.

[4] The court stated that other available methods of enforcement include (Pet. App. 21a–22a): (1) prospective injunctive relief obtained in suits by private individuals; (2) suits for injunctive and monetary relief by the United States; and (3) possible congressional authorization of private suits for injunctive and monetary relief in state courts.

SUMMARY OF ARGUMENT

1. In amending Title VII in 1972 Congress clearly manifested its intent to create a cause of action on behalf of state employees complaining of illegal discrimination in employment. No distinction was drawn between prospective injunctive and retroactive monetary relief; the states, no less than private employers, were meant to be subject to Title VII's "twin statutory objectives" of deterring employment practices of dubious legality and of fully compensating persons for injuries suffered on account of unlawful employment discrimination. See *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 421. "There is nothing on the face of the statute or in its legislative history that justifies the creation of drastic and categorical distinctions between" injunctive and back pay relief. *Id.* at 423.

The court below, however, while acknowledging Congress' intent that the states be fully answerable in federal court for employment discrimination, in effect ruled unconstitutional so much of Title VII as authorizes suit against a state by an individual seeking back pay or other retroactive monetary relief. In so doing the court misperceived the constitutional allocation of power between the federal and state governments, and, through an erroneous balancing process, took away powers unequivocally committed to the federal government by the Fourteenth Amendment.

That Amendment enlarged the power of the federal government and correspondingly contracted the au-

thority of the states. Like the Thirteenth and Fifteenth, it was designed in large measure to prohibit racial discrimination and to assure all persons equal treatment under law. The states had been parties to the abuses that the Amendment was intended to correct, and it was clear to all at the time of its passage that Section 5 of the Amendment, by giving Congress "power to enforce, by appropriate legislation, the provisions of this article," took from the states the autonomy that had previously enabled them, with impunity, to deprive individuals of rights solely on the basis of race. The Fourteenth Amendment, in short, was the "centerpiece" of "the new structure of law" reflecting "the basic alteration in our federal system wrought in the Reconstruction era through federal legislation and constitutional amendment" (*Mitchum* v. *Foster,* 407 U.S. 225, 238–239).

It follows that, as to actions authorized by Congress under that grant of power, the ratification of the Fourteenth Amendment abrogated whatever immunity to suit in federal court the states may theretofore have enjoyed. In reaching a contrary result the court below reasoned that it properly balanced and gave fair effect to both the Eleventh and Fourteenth Amendments. But the Fourteenth, remedial in purpose and aimed at state sanctioned and perpetrated abuses, was meant not to balance the Eleventh but *pro tanto* to override it. As this Court observed in *Ex parte Virginia,* 100 U.S. 339, 346, a decision closely contemporaneous with the enactment of the Fourteenth Amendment, legislation enacted thereunder is within the domain of congressional power even if it "is restrictive of what the

State might have done before the constitutional amendment was adopted. The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty."

The rationale of *Ex parte Virginia* was recently reaffirmed in *South Carolina* v. *Katzenbach,* 383 U.S. 301, in which the sweeping provisions of the Voting Rights Act of 1965[5] were challenged on the ground that they unconstitutionally invaded the powers of the states. This Court dismissed the bill of complaint, ruling that the remedies authorized by the Act—many of which are far more intrusive upon state sovereignty than the back pay remedy authorized by Title VII[6]—were within Congress' power to enact under the Fifteenth Amendment. "The gist of the matter," said the Court, in language equally applicable to the Fourteenth Amendment and the instant case, "is that the Fifteenth Amendment supersedes contrary exertions of state power," and Section 2 of that Amendment, virtually identical in language and purpose

[5] 79 Stat. 437, as amended, 42 U.S.C. 1973 *et seq.*

[6] *E.g.*, Section 5, 42 U.S.C. 1973c, requiring covered states to submit any changes in voting laws to the Attorney General for clearance, or to the United States District Court for the District of Columbia for a declaratory judgment, before they may take effect. See *Connor* v. *Waller*, 421 U.S. 656; *Georgia* v. *United States*, 411 U.S. 526.

to Section 5 of the Fourteenth, gave Congress "full remedial powers to effectuate" its terms (383 U.S. at 325, 326).

Congress accordingly acted within its power to effectuate the Fourteenth Amendment in subjecting the states to the terms of Title VII to the same extent as private employers. The remedies are no less important to the goals of the statute than the rights conferred, and no more beyond Congress' power to prescribe. As this Court recently noted in *Albemarle Paper Co.* v. *Moody, supra,* 422 U.S. at 421 (footnote omitted), the back pay remedy provided by Title VII is integral to "the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." Thus the decision below should be reversed and the case remanded for a determination of the merits of petitioners' claims for retroactive monetary relief.

This result is not inconsistent with *Edelman* v. *Jordan,* 415 U.S. 651. In that case the principal issue was whether an action to recover welfare benefits wrongfully withheld was a suit against state officials under the doctrine of *Ex parte Young,* 209 U.S. 123, or a suit against the state itself. The suit was held to be against the state itself, and Congress was found not to have authorized it. The question presented here, regarding Congress' power to enforce the Fourteenth Amendment over a state claim of sovereign immunity, therefore did not arise and was not decided.

2. Title VII expressly authorizes the district court to allow the prevailing party "a reasonable attorney's fee as part of the costs" of any enforcement action brought under that statute's provisions. Section 706(k), 42 U.S.C. 2000e–5(k). Such an award has only "an ancillary effect on the state treasury [and] is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*" (*Edelman* v. *Jordon, supra,* 415 U.S. at 668). Unlike "an accrued monetary liability" which may be "in practical effect indistinguishable in many respects from an award of damages" (*id.* at 664, 668), an award of attorney's fees is not intended to compensate the plaintiff for past injuries or punish the state for past malfeasance. Rather, it is simply an incidental cost of the litigation which the state may be made to bear "just as any other litigant." *Fairmont Creamery Co.* v. *Minnesota,* 275 U.S. 70, 77; *Souza* v. *Travisono,* 512 F.2d 1137 (C.A. 1). This Court acknowledged as much in affirming *Sims* v. *Amos,* 340 F. Supp. 691 (M.D. Ala.), summarily affirmed, 409 U.S. 942, over the state's protest that its sovereign immunity precluded an award of counsel fees against it. Thus, the court of appeals was correct in ruling that attorney's fees may be taxed against the state and its decision in this regard should be affirmed.

Even if this Court were to decide, however, that an award of attorney's fees does not fall within the rationale of *Ex parte Young,* but more closely resembles

the sort of relief that implicates the state's sovereignty for purposes of the Eleventh Amendment, the judgment below should nonetheless be upheld since, for the reasons stated in point 1, *supra,* Congress has the power under the Fourteenth Amendment to provide for such an award. "[T]he private right of action remains an essential means of obtaining judicial enforcement of Title VII" (*Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 45), and this is an instance in which "Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation" (*Alyeska Pipeline Service Co.* v. *Wilderness Society,* 421 U.S. 240, 263). At the outset of a private action to enforce Title VII the plaintiff cannot accurately predict whether and to what extent he may recover retroactive compensation for injuries suffered through past discrimination. The possibility that attorney's fees will offset or even exceed any judgment recovered may inhibit suit and substantially impede enforcement of the "congressional command that each employee be free from discriminatory practices" (*Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 51). Actions for injunctive relief alone would be likely to be discouraged entirely. The power of the district court to award attorney's fees is thus integral to enforcement of the statute and the guarantees of the Fourteenth Amendment, and accordingly Congress did not exceed its constitutional authority in providing for such awards.

ARGUMENT

I

CONGRESS DID NOT EXCEED ITS POWERS UNDER THE FOURTEENTH AMENDMENT IN PROVIDING IN TITLE VII FOR PRIVATE ACTIONS AGAINST STATE EMPLOYERS FOR RETROACTIVE MONETARY RELIEF

Parden v. *Terminal Railway Co.,* 377 U.S. 184, 187, marked "the first time in this Court [that] a State's claim of immunity against suit by an individual [met] a suit brought upon a cause of action expressly created by Congress." There the plaintiff sought damages under the Federal Employers' Liability Act[7] ("FELA") for injuries sustained while employed by the defendant state-owned-and-operated railroad. The state's defense of immunity, said the Court, presented two questions: "(1) Did Congress in enacting the FELA intend to subject a State to suit in these circumstances? (2) Did it have the power to do so, as against the State's claim of immunity?" (*id.* at 187). Both inquiries were answered in the affirmative and the plaintiff was held entitled to maintain his suit. See *id.* at 187–198.

In only two cases since *Parden* has this Court discussed similar state claims of immunity, and in both of them the plaintiffs failed to clear the initial hurdle of showing that Congress intended to enable them to sue. In *Employees* v. *Department of Public Health and Welfare of Missouri,* 411 U.S. 279, 285, where the

[7] 45 U.S.C. 51–60.

plaintiffs sought overtime compensation allegedly due them under the Fair Labor Standards Act of 1938,[8] the Court found "not a word in the history of the [Act] to indicate a purpose of Congress" to create a cause of action on behalf of private plaintiffs against the state. And in *Edelman* v. *Jordan,* 415 U.S. 651, 672, involving a claim for welfare benefits wrongfully withheld, the Court ruled that "the threshold fact of congressional authorization to sue" the state under the Social Security Act[9] was absent. In these decisions, then, the question whether Congress had the power to do something it evinced no intention of doing was properly not addressed.[10] And in *Parden,* although Congress was held not only to have intended to subject the states to suit but also to possess the power to do so, its power was said to derive, not from the Fourteenth Amendment, which was not in issue, but from the state's acquiescence to suit as evidenced by its conduct subsequent to passage of the FELA. See 377 U.S. at 192; *Employees* v. *Department of Public Health and Welfare of Missouri, supra,* 411 U.S. at 280–281, n. 1; *Edelman* v. *Jordan, supra,* 415 U.S. at

[8] 29 U.S.C. 216(b).

[9] 42 U.S.C. 1381–1385.

[10] The court of appeals erred in suggesting (Pet. App. 22a–23a) that in *Edelman* the Court may have foreclosed the Fourteenth Amendment argument made here. As we discuss *infra*, pp. 37–40, in overruling certain prior decisions involving Fourteenth Amendment claims the Court was construing the reach of *Ex parte Young*, 209 U.S. 123, and in any event overruled those cases only "to the extent that they are inconsistent with our holding today" (415 U.S. at 671), which never once mentioned the Fourteenth Amendment.

672. Accordingly, none of these cases involved the issue whether a state claim of sovereign immunity limits Congress' power to enforce the Fourteenth Amendment by providing for suits against a state by individuals seeking monetary relief. That is the question for decision here for, as we now show, the court below correctly concluded that in amending Title VII to apply to state employees Congress unmistakably intended to subject the states to such suits.

A. THE 1972 AMENDMENTS TO TITLE VII PROVIDE FOR THE AWARD OF MONETARY RELIEF IN PRIVATE SUITS AGAINST PUBLIC EMPLOYERS

Under the approach to state sovereign immunity cases set forth in *Parden, supra,* the first inquiry to be made—what did Congress intend—is principally a question of statutory construction, whereas the second—what power has Congress—is a constitutional issue and thus should be reached only if resolution of the first question is not dispositive of the case. Accordingly, although respondents here do not appear to contest the court of appeals' ruling that Congress in 1972 meant to extend the rights and remedies of Title VII to state employees, to allay any possible doubt on this score we now show that the court below decided this issue correctly.

As originally enacted, Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U.S.C. 2000e *et seq.*, prohibited discrimination in employment on account of race, sex, religion, or national origin, but only by private employers: state and local governments were

specifically excluded from coverage.[11] The Act established the Equal Employment Opportunity Commission (EEOC), and empowered it to investigate and to attempt to conciliate charges of discrimination in employment, although not to bring suit itself. Rather, enforcement was committed to the aggrieved employee, who was given the right to bring an action against his employer in federal district court after satisfying the procedural prerequisites of the Act (Section 706 (a)–(e), 42 U.S.C. 2000e–5(a)–(e)), and to the Attorney General, who was authorized to bring suit against private employers who allegedly engaged in a pattern or practice of discrimination (Section 707, 42 U.S.C. 2000e–6). The remedies available to an individual plaintiff who succeeded in showing that his employer "has intentionally engaged in or is intentionally engaging in an unlawful employment practice" included not only injunctive relief against continuation of the unlawful practice, but also affirmative relief "as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay * * *" (Section 706(g), 42 U.S.C. 2000e–5(g)).

In 1972 Congress enacted major amendments to Title VII. State and local governments, governmental agencies, and political subdivisions were included

[11] The term "employer" was defined in Section 701(b), 42 U.S.C. 2000e(b), to mean "a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year * * * but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian Tribe, or a State or political subdivision thereof * * *."

within the definition of the term "person," and the exclusion of states and political subdivisions thereof from the definition of "employer" was stricken from the Act (86 Stat. 103, 42 U.S.C. (Supp. IV) 2000e (a), (b)). The EEOC was given power to bring suit in a federal district court in cases involving discrimination by private employers, and the Attorney General was authorized to bring such suits against public employers.[12] The amendments not only retained the right of individuals to sue on their own behalf, but also expanded the class of individuals covered to include persons aggrieved by public employers.[13]

[12] The rationale for this allocation of authority between the Attorney General and the EEOC does not appear in the Conference Report accompanying the version of the bill finally enacted. See S. Conf. Rep. No. 92–681, 92d Cong., 2d Sess. 17–18 (1972). Senator Williams, however, the floor manager of the Senate bill, supported such a division of authority when the version of the bill then under consideration would have permitted the EEOC to issue cease and desist orders. He stated that an alternative procedure of permitting the Attorney General to sue following failure of conciliation would provide "the necessary power to achieve results without the needless friction that might be created by a Federal executive agency issuing orders to sovereign States * * *" (118 Cong. Rec. 1816 (1972)). In any event, there is no indication that the ultimate congressional determination to empower the Attorney General rather than an administrative agency to sue state employers contained any implication as to the rights of private individuals to sue state employers.

[13] Section 706(f)(1), 42 U.S.C. (Supp. IV) 2000e–5(f)(1), provides that if upon satisfaction of certain procedural prerequisites "the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party,

Congress also amended the remedial provisions of the Act to make it clear that the affirmative action to which employers might be subject was "not limited to" reinstatement, hiring, or an award of back pay, but included "any other equitable relief as the court deems appropriate" (Section 706(g), 42 U.S.C. (Supp. IV) 2000e–5(g)).[14] Congress did not, however, limit the availability of monetary relief to suits against private employers. Given this evidence of Congress' close attention to Section 706(g), there is no reason to suppose that its terms should not be given their plain meaning: in a suit by an aggrieved individual against an employer, whether private or public, the district court is empowered to order the reinstatement or hiring of employees, with back pay, or any other equitable relief the court deems appropriate.

The legislative history of the 1972 Amendments fully supports this conclusion. The bill reported by the House Committee on Education and Labor provided for the expansion of Title VII to include both state and local government employers and the federal government. H.R. Rep. No. 92–238, 92d Cong., 1st Sess. 33 (1971). Although this provision did not appear in

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the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice."

[14] Section 706(g) was also amended to limit the employer's period of liability for back pay to two years prior to the employee's filing of a complaint with the EEOC.

the bill that finally left the House, it was reinserted in conference committee and the Report of the House Committee is therefore relevant (*id.* at 17):

> Presently approximately 10.1 million persons are employed by State and local governmental units. This figure represents an increase of over 2 million employees since 1964. Indications are that the number of employees in State and local government will continue to increase, perhaps even more rapidly. Few of these employees, however, are afforded the protection of an effective forum to assure equal employment. The bill amends section 701 of the Civil Rights Act of 1964 (section 2 of the bill) to include State and local governments, governmental agencies and political subdivisions within the definition of an "employer" under Title VII. All State and local government employees would under the bill have access to the remedies available under the Act.
>
> In a report released in 1969, the U.S. Commission on Civil Rights examined equal employment opportunity in public employment in seven urban areas located throughout the country—North as well as South. The report's findings indicate that widespread discrimination against minorities exists in State and local government employment, and that the existence of this discrimination is perpetuated by the presence of both institutional and overt discriminatory practices.
>
> * * * * *
>
> This widespread discrimination is evidence that State and local governmental units have not instituted equal employment opportunity

> required by the national policy to eliminate discrimination in employment.

In addition to extending Title VII to state and local governments, the House Committee bill also gave the EEOC the power to issue cease and desist orders. The bill substituted on the floor of the House granted the EEOC power to institute suits in federal court rather than to issue cease and desist orders, and did not include coverage of state and local governments. 117 Cong. Rec. 32111 (1971).

The bill reported by the Senate Committee on Labor and Public Welfare, however, like the House Committee bill, extended Title VII to state and local governments. S. Rep. No. 92–415, 92d Cong., 1st Sess. 2 (1971). The Senate Committee reported (*id.* at 9) that "employees of State and local governments are entitled to the same benefits and protections in equal employment as the employees in the private sector of the economy" but that "[f]ew of these employees, however, are afforded the protection of an effective Federal forum for assuring equal employment opportunity."

A proposed amendment to the Senate bill to continue the exemption of public employers was defeated by a vote of 59 to 16. 118 Cong. Rec. 1840 (1972). Speaking in opposition to the amendment, Senator Williams, the floor manager of the Committee bill, stated (118 Cong. Rec. 1815 (1972)):

> Mr. President, one of the most vital provisions of S. 2515 is the part which would amend section 701 to broaden the jurisdictional coverage of title VII of the Civil Rights Act of 1964

> to include State and local government employees. * * *
>
> At this time in our country's history, it should be beyond question that the employees of State and local governments are entitled to the same benefits and protections in equal employment as are employees in the private sector. In fact, the well-documented and widespread discrimination among State and local government employees is a shameful condition that should be eliminated wherever and whenever possible.

The substitute bill ultimately passed by the Senate retained the extension of Title VII to state and local government employers (118 Cong. Rec. 4944 (1972)); at the ensuing Conference Committee the House Conferees acceded to the Senate version (S. Conf. Rep. No. 92–681, 92d Cong., 2d Sess. 15 (1972); H.R. Conf. Rep. No. 92–899, 92d Cong., 2d Sess. 15 (1972)); and the bill recommended by the Conference Committee was subsequently adopted (118 Cong. Rec. 7170, 7572–7573 (1972)).

In sum, the plain language and legislative history of the statute unequivocally reveal the intention of Congress to accord employees of state and local governments all of the protection available to private employees under Title VII. As the court below noted (Pet. App. 17a), "[t]o suggest otherwise would be to hold Congress to a degree of legislative specificity it could not and does not customarily meet." Prospective injunctive relief and back pay awards were intended to be equally available: "There is nothing on the face of the statute or in its legislative history that justifies

the creation of drastic and categorical distinctions between those two remedies" (*Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 423). The question remaining, accordingly, is whether Congress' intentions reached beyond its constitutional powers.

B. THE FOURTEENTH AMENDMENT EMPOWERED CONGRESS TO ENFORCE ITS PROVISIONS AGAINST THE STATES NOTWITHSTANDING CLAIMS OF SOVEREIGN IMMUNITY

Congress perceived its power to subject the states to suit by individuals under Title VII to derive from the Fourteenth Amendment.[15] The court below, while acknowledging (Pet. App. 19a) that "legislation en-

[15] The House Committee Report noted (H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 19 (1971)):

"The expansion of Title VII coverage to State and local government employment is firmly embodied in the principles of the Constitution of the United States. The Constitution has recognized that it is inimical to the democratic form of government to allow the existence of discrimination in those bureaucratic systems which must directly affect the daily interactions of this Nation's citizens. The clear intention of the Constitution, embodied in the Thirteenth and Fourteenth Amendments, is to prohibit all forms of discrimination.

"Legislation to implement this aspect of the Fourteenth Amendment is long overdue * * *."

See also S. Rep. No. 92-415, 92d Cong., 1st Sess. 10-11 (1971).

Senator Javits, in opposing the proposed amendment to exclude state and local employers from Title VII coverage (see p. 18, *supra*), stated (118 Cong. Rec. 1839 (1972)):

"Mr. President, it is very important, as we are about to vote on this amendment, that we recognize that of all the provisions in this bill, this has the most solemn congressional sanction, because it is based not on the commerce clause, which relates to the relationships between individuals as well as with governments, but is based on the 14th amendment. This is a paramount right which is created for all Americans."

forcing individual rights under the Fourteenth Amendment must to some extent subject states to private suits," concluded that Congress' power did not extend to providing for remedies in the form of monetary relief. We submit, to the contrary, that the shift in the balance of power between the federal government and state goverments occasioned by the Fourteenth Amendment involved no such distinction between rights and remedies. Indeed, the judgment below recalls the situation that in large degree gave rise to the Fourteenth Amendment: the rights to equal employment opportunity that Congress has declared are to be enjoyed by all workers would have only hortatory effect in public employment if the remedies Congress found essential to their enforcement were unavailing against the states.

Section 1 of the Fourteenth Amendment by its terms expressly restricts the powers of the states. After prescribing the requisites for United States citizenship, it declares:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

These words, taken alone, might be construed merely to empower the federal government, through the judiciary, to strike down offending state statutes and regulations. But the plan of the Amendment goes further. Section 5 provides that "[t]he Congress shall

have *power to enforce,* by appropriate legislation, the provisions of this article" (emphasis added). At the time of its enactment [16] it was well understood, by both advocates and opponents, that this provision would result in a substantial realignment of the federal-state relationship that had theretofore existed.[17]

The opponents of the Civil War Amendments repeatedly expressed the understanding that the Amendments, and the Fourteenth Amendment in particular, would transfer power from the states to the federal government and diminish state sovereignty. For example, Congressman John A. Nicholson, objecting to the Fourteenth Amendment, said (Cong. Globe, 39th Cong., 1st Sess. 2080 (1866)):

> Thus we possess a system of government, which, to a foreign observer, may appear artificial and complex, but which to us, who are furnished with the key, is simple in the extreme. That key is the jealousy which has been apparent through all our history, for the right of each State to control its own domestic affairs, and the firmness with which that right has always been maintained.
>
> From all these various conflicting causes harmony has been evoked; and the most perfect equilibrium is presented to our view in the

[16] The Fourteenth Amendment was proposed by Congress in 1866 and ratified in 1868.

[17] We have set forth in the Appendix, *infra*, pp. 51–64, relevant portions of the House and Senate debates on the Reconstruction Amendments, and implementing legislation, relating to Congress' understanding of the impact of these Amendments upon the relationship between the states and the federal government.

> equal distribution of the Federal powers, in the limitation upon State and Federal power, and the line that is drawn between them; like that huge mass of rock which nature has so nicely poised that a child's hand can disturb its balance, but a giant's strength could not move it from its base.
>
> That nicely adjusted balance is now, by this amendment, to be permanently overthrown. The line of demarkation between State and Federal power, which has been already too much obscured by the great latitude of construction given of late to the several grants of power, is now to be entirely obliterated.

Congressman Samuel S. Cox, speaking in opposition to the Thirteenth Amendment, asked (Cong. Globe, 38th Cong., 2d Sess. 242 (1865)):

> Do you not break down, by this amendment, the distinction between the spheres of the State and national Governments, which is characteristic of our system, as old as our Union? [18]

Many of the proponents of the Amendments acted out of a concern that the national government lacked power to prevent the states from depriving persons of the civil rights and liberties that the unamended Constitution was thought already to have guaranteed.[19]

[18] See also remarks of Congressman Chilton A. White, Appendix, *infra*, at 51; remarks of Congressman Andrew J. Rogers, *id.* at 52–53; remarks of Congressman Robert S. Hale, *id.* at 53–54; remarks of Congressman Thomas T. Davis, *id.* at 54–55; further remarks of Congressman Samuel S. Cox, *id.* at 51–52; remarks of Senator Garrett Davis, *id.* at 62.

[19] Although the Constitution of the United States established a federal government of enumerated powers (*M'Culloch* v. *Mary-*

But whether or not the substantive terms of the Amendments actually deprived the states of any power that had ever rightfully been theirs,[20] there could be no mistaking the conferral upon Congress of the power, "by appropriate legislation," to enforce those substantive guarantees notwithstanding state claims of sovereignty. Indeed, the proponents of the Amendments repeatedly emphasized that an expansion of congressional authority was the very purpose of the Amendments, and that such a realignment of the distribution of authority between the federal and state governments was within the power of the citizenry to effect through the process of constitutional amendment.[21] For example, Congressman John A. Bingham, who drafted what are now the first and fifth sections of the Fourteenth Amendment, stated (Cong. Globe, 39th Cong., 1st Sess. 1088–1089 (1866)):

> The proposition pending before the House is simply a proposition to arm the Congress of the

land, 4 Wheat. 316), the fear most often expressed during its ratification was that the federal powers would encroach upon the rights of citizens. See *Barron* v. *Mayor and City Council of Baltimore*, 7 Pet. 243, 250. These concerns led to the passage of the Bill of Rights, which limited the power of the federal government only. *Barron* v. *Mayor and City Council of Baltimore*, *supra*, 7 Pet. at 250. The Tenth Amendment made explicit the limitations of federal power by reserving to the states or the people "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States * * *."

[20] See remarks of Congressman Thaddeus Stevens, Appendix, *infra*, at 57; remarks of Congressman John A. Bingham, *id.* at 59–60; remarks of Senator Jacob M. Howard, *id.* at 60–61; remarks of Senator Luke P. Poland, *id.* at 61–62; remarks of Congressman Jehu Baker, *id.* at 62.

[21] *E.g.*, remarks of Congressman Anson Herrick, Appendix, *infra*, at 52.

> United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution today. * * *
>
> * * * * *
>
> But the gentleman reiterates the old cry of State rights, and says "You are impairing State rights." I would like to know, and when the gentleman comes to make another argument on this subject, I respectfully ask him to inform us whence he derives the authority for supposing, if he does so suppose, that any State has the right to deny to a citizen of any other State any of the privileges or immunities of a citizen of the United States. And if a State has not the right to do that, how can the right of a State be impaired by giving to the people of the United States by constitutional amendment the power by congressional enactment to enforce this provision of their Constitution?

In explaining the relationship between the first and fifth sections of the Amendment, Senator Jacob M. Howard, a member of the Joint Committee on Reconstruction, which reported out the amendment, said (Cong. Globe, 39th Cong., 1st Sess. 2766 (1866)):

> The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees. How will it be done under the present amendment? As I have remarked, they are not powers granted to Congress, and therefore it is necessary, if they are to be effectuated and enforced, as they assuredly ought to be, that additional power should be given to Congress to that end.

> This is done by the fifth section of this amendment, which declares that "the Congress shall have power to enforce by appropriate legislation the provisions of this article." Here is a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution.[22]

In short, it was well understood that upon its passage the Fourteenth Amendment would not only explicitly deprive the states of authority to interfere with certain fundamental civil rights, but also expressly arm the Congress with the power to enforce its provisions "by appropriate legislation" notwithstanding objections by the states of alleged interference with their sovereign prerogatives. This realignment of the federal-state relationship and the broad enforcement powers conferred upon Congress were recognized by this Court in a case decided shortly after the Amendment's adoption, *Ex parte Virginia,* 100 U.S. 339. In that case a state judge, arrested under a federal statute making it a crime to exclude blacks from grand and petit juries, sought *habeas corpus* on the ground that the statute was beyond Congress' power to enact under the Fourteenth Amendment. The Court began by explaining that "[o]ne great purpose" of both the Thirteenth and

[22] See also remarks of Congressman Thaddeus Stevens, Appendix, *infra*, at 57; remarks of Congressman John M. Broomall, *id.* at 57–58; remarks of Congressman Thomas D. Eliot, *id.* at 58; further remarks of Senator Jacob M. Howard, *id.* at 60–61; remarks of Senator Luke P. Poland, *id.* at 61–62; remarks of Congressman John A. Bingham, *id.* at 59–60.

Fourteenth Amendments was to assure equal civil rights to blacks and to this end "[t]hey were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress" (*id.* at 344–345). The right to equal protection of the laws accorded by the Fourteenth Amendment, it was said, was "placed by the amendment under the protection of the general government and guaranteed by it"; furthermore, "this protection and this guarantee, as the fifth section of the amendment expressly ordains, may be enforced by Congress by means of appropriate legislation" (*id.* at 345). The Court then pointed out the impact of Section 5, in language squarely addressed to the powers of enforcement thereby conferred upon Congress (*id.* at 345–348; italicized emphasis in original; boldface emphasis added):

> All of the amendments derive much of their force from [the provisions empowering Congress to enact "appropriate legislation"]. It is not said the *judicial power* of the general government shall extend to enforcing the prohibitions and to protecting the rights and immunities guaranteed. It is not said that branch of the government shall be authorized to declare void any action of a State in violation of the prohibitions. It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the amendments fully effective. Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in

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view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Nor does it make any difference that such legislation is restrictive of what the State might have done before the constitutional amendment was adopted. The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of state sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact. This extent of the powers of the general government is overlooked, when it is said, as it has been in this case, that the act [forbidding exclusion of black jurors] interferes with State rights. * * * [I]n exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power. Her rights do not reach to that extent. Nor can she deny to the general government the right to exercise all its granted powers, though they may interfere with the full enjoyment of rights she would have if these powers had not been thus granted. Indeed, every addition of power to the general government involves a corresponding diminution of

the governmental powers of the States. It is carved out of them.

* * * * *

* * * Were it not for the fifth section of [the Fourteenth Amendment], there might be room for argument that the first section is only declaratory of the moral duty of the State * * *. * * * **But the Constitution now expressly gives authority for congressional interference and compulsion in the cases embraced within the Fourteenth Amendment. It is but a limited authority, true, extending only to a single class of cases; but within its limits it is complete.**

The significance of the shift in federal-state power caused by the Civil War Amendments, and the broad construction of Congress' power to enforce the terms of those Amendments as expressed in *Ex parte Virginia*, have been reiterated and elaborated in recent decisions of this Court. In *Mitchum* v. *Foster*, 407 U.S. 225, the Court based its conclusion that 42 U.S.C. 1983 is an express exception to the anti-injunction statute, 28 U.S.C. 2283, on the historical fact that Section 1983 was "a product of a vast transformation from the concepts of federalism that had prevailed in the late 18th century when the anti-injunction statute was enacted" (*id.* at 242). That statute "goes back almost to the beginnings of our history as a Nation" to a provision first enacted in 1793 (*id.* at 231, 232–233 n. 10).[23] Section 1983, however, was modelled after Section 2 of the Civil Rights Act of 1866, 14 Stat. 27, which "was enacted for the express pur-

[23] Similarly, the Eleventh Amendment was adopted in 1798.

pose of 'enforc[ing] the Provisions of the Fourteenth Amendment'" (*id.* at 238). "The predecessor of § 1983," said the Court, "was thus an important part of the basic alteration in our federal system wrought in the Reconstruction era through federal legislation and constitutional amendment. As a result of the new structure of law that emerged in the post-Civil War era—and especially of the Fourteenth Amendment, which was its centerpiece—the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established" (*id.* at 238–239).

South Carolina v. *Katzenbach*, 383 U.S. 301, even more explicitly reaffirms Congress' broad powers to enforce the Civil War Amendments. There the plaintiff state challenged the constitutionality of certain remedial provisions of the Voting Rights Act of 1965, 79 Stat. 437, 42 U.S.C. 1973 *et seq.*, including (see 383 U.S. at 315–317) the suspension of existing state literacy tests and similar voting qualifications;[24] the suspension of changes in voting requirements pending their submission to and clearance by the Attorney General or their submission to and approval by the United States District Court for the District of Columbia in a declaratory judgment suit;[25] and the assignment of federal examiners upon certification by the Attorney General to list qualified applicants who are thereafter entitled to vote in all elections.[26] Each

[24] Section 4(a), 42 U.S.C. 1973b(a).

[25] Section 5, 42 U.S.C. 1973c.

[26] Sections 6(b), 7, 9, and 13(a), 42 U.S.C. 1973d(b), 1973e, 1973g, and 1973k(a).

of these remedies the Court found rational and appropriate means of enforcing the Fifteenth Amendment, and in so doing pointed up the error behind the attempt by the court of appeals in the instant case to balance the state's claim of sovereign immunity against the legitimate power conferred on the federal government by the Reconstruction Amendments.

There, as here, the state challenged the remedial provisions "on the fundamental ground that they exceed the powers of Congress and encroach on an area reserved to the States by the Constitution" (383 U.S. at 323). There, as here, "[t]he ground rules for resolving [the question whether Congress has exercised its powers in an appropriate manner with relation to the states] are clear" (*id.* at 324). In words equally applicable to the Fourteenth Amendment and the present case, the Court declared, "[t]he language and purpose of the Fifteenth Amendment, the prior decisions construing its several provisions, and the general doctrines of constitutional interpretation, all point to one fundamental principle. As against the reserved powers of the States, Congress may use *any rational means* to effectuate the constitutional prohibition of * * * discrimination in voting" (*ibid.*; emphasis added).

The court of appeals in the instant case acknowledged (Pet. App. 19a) "that legislation enforcing individual rights under the Fourteenth Amendment must to some extent subject states to private suits," but concluded that "it does not follow that Congress necessarily has power to provide the particular remedy sought here." In *South Carolina* v. *Katzenbach* the state similarly attempted to put the remedies that

Congress might prescribe in enforcement of the Fifteenth Amendment upon an inferior footing to the other powers conferred upon Congress by the Amendment, but the Court, as it did in *Ex parte Virginia, supra,* rejected any attempt to carve out of the Civil War Amendments' enforcement provisions an exception based on claims of state sovereignty. Referring to Section 2 of the Fifteenth Amendment, which like Section 5 of the Fourteenth Amendment authorizes Congress "to enforce this article by appropriate legislation," the Court said (383 U.S. at 325–326; boldface emphasis added):

> By adding this authorization, the Framers indicated that Congress was to be chiefly responsible for implementing the rights created in § 1. "It is the power of Congress which has been enlarged. Congress is authorized to *enforce* the prohibitions by appropriate legislation. Some legislation is contemplated to make the [Civil War] amendments fully effective." *Ex parte Virginia,* 100 U.S. 339, 345. Accordingly, in addition to the courts, Congress has ***full remedial powers*** to effectuate the constitutional prohibition against racial discrimination in voting.

South Carolina v. *Katzenbach* and *Ex parte Virginia* teach that the court of appeals misconstrued its task in this case. The congressional powers of enforcement conferred by the Fourteenth Amendment are not conditioned upon their harmonious accommodation with state immunity under the Eleventh. The balancing approach applied by the court below would return matters to the very situation that the sponsors of the Fourteenth Amendment sought to remedy: Congress

would be unable fully to enforce rights granted pursuant to the Constitution but interfered with by the states. Rather than attempting to accommodate the Fourteenth Amendment to an earlier constitutional provision it was intended *pro tanto* to override, the court of appeals should have inquired only "whether the specific remedies prescribed in [Title VII] were an appropriate means of combatting the evil" (*South Carolina* v. *Katzenbach, supra,* 383 U.S. at 328) of unlawful discrimination in employment.[27] Indeed, the

[27] It is immaterial to this judicial determination that Congress may have "at its disposal various methods other than private federal damages suits for enforcing Fourteenth Amendment rights" (Pet. App. 20a). Congress is not required to forego the legitimate exercise of one of its constitutional powers simply because an alternative less disagreeable to the states may exist. In any event, the three alternatives suggested by the court of appeals (Pet. App. 21a–22a; *supra*, note 4) are inadequate to the full enforcement of the "congressional command that each employee be free from discriminatory practices" (*Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 51). For the reasons stated in the text immediately following the back pay remedy is equally necessary to enforcement of Title VII as the availability of injunctive relief, which by itself neither deters discrimination before suit nor compensates for past injury. And although the Attorney General is authorized to sue and recover back benefits on behalf of private individuals, Section 706(f)(1), 42 U.S.C. (Supp. IV) 2000e–5(f)(1), the resources of the Justice Department are limited and "the private right of action remains an *essential* means of obtaining judicial enforcement of Title VII" (415 U.S. at 45; emphasis added). Finally, as the court of appeals acknowledged (Pet. App. 21a–22a; footnote omitted), "Congress did not suggest that jurisdiction over private actions under Title VII extends to state courts," and it may be doubtful whether it could compel state courts to award remedies against a state that a federal court could not award. See *Employees* v. *Department of Public Health and Welfare of Missouri, supra,* 411 U.S. at 298 (Marshall, J., concurring). In any event, this Court

remedies of the Voting Rights Act upheld by this Court are far more intrusive upon state sovereignty than the present remedial scheme, which merely subjects public employers to the same liability as other employers for awards of monetary relief of injuries caused by their unlawful employment practices.[28] The monetary remedies of Title VII, therefore, are not to be tested against "contrary exertions of state power," but according to whether they are within Congress' "full remedial powers to effectuate" the Fourteenth Amendment (383 U.S. at 325, 326). If they are an appropriate means of enforcing the Amendment's guarantee of equal protection, they are constitutional.

C. THE RETROACTIVE MONETARY RELIEF AFFORDED BY TITLE VII IS AN APPROPRIATE MEANS OF COMBATTING EMPLOYMENT DISCRIMINATION BY STATE EMPLOYERS

Albemarle Paper Co. v. *Moody*, 422 U.S. 405, removes all doubt from the question whether Title VII's provision for back pay and other forms of

recently noted that "'the choice of forums inevitably affects the scope of the substantive right to be vindicated'" and that "Congress intended *federal* courts to exercise final responsibility for enforcement of Title VII" (*Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 56; emphasis added). That Congress might have conferred some of that responsibility upon state courts does not detract from its constitutional power to enact a remedial scheme that relies primarily or exclusively on federal courts.

[28] See *Connor* v. *Waller*, 421 U.S. 656 (certain Mississippi enactments "are not now and will not be effective as laws until and unless cleared pursuant to § 5" of the Act); *Georgia* v. *United States*, 411 U.S. 526; *id.* at 542, 543 (White, J., dissenting) ("[I]t remains a serious matter that a sovereign State must submit its legislation to federal authorities before it may take effect"); *id.* at 545 (Powell, J., dissenting).

retroactive monetary relief is an appropriate and legitimate response to the problem of discrimination in employment. Although that case involved a private employer, its rationale is fully applicable to state employers as well.

At issue in that case was the appropriate standard to be followed by a district court in determining whether to award or deny back pay. The Court began by noting that the power to make such an award was bestowed upon the courts "as part of a complex legislative design directed at a historic evil of national proportions" (422 U.S. at 416), and that the district court's decision must "be measured against the purposes which inform Title VII" (*id.* at 417). These purposes were found to be two: the prophylactic purpose of eradicating employment discrimination throughout the nation, and the "make whole" purpose of fully compensating persons for past injuries suffered on account of such discrimination (see *id.* at 417–422). Beyond its apparent relation to the latter, the back pay remedy was held to have an "obvious connection" with the former: "If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that 'provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history'" (*id.* at 417–418).

Thus, the back pay remedy was deemed critical to "the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination" (422 U.S. at 421, footnote omitted). The Court accordingly ruled that such relief should be denied only for reasons which if generally applied would not frustrate these twin statutory objectives (*ibid.*). And the mere absence of bad faith by the employer was held to be no barrier to back pay, for "[to] condition the awarding of backpay on a showing of 'bad faith' would be to open an enormous chasm between injunctive and backpay relief under Title VII. There is nothing on the face of the statute or in its legislative history that justifies the creation of drastic and categorical distinctions between those two remedies" (*id.* at 423; footnote omitted).

Nothing in *Albemarle Paper Co.* v. *Moody* suggests that its interpretation of Title VII is any less applicable to public than to private employers. Both may reasonably be expected to need the "spur or catalyst" afforded by the prospect of retroactive monetary relief to prompt the reevaluation of existing practices and the avoidance of any that appear "of dubious legality" (422 U.S. at 417). Certainly public no less than private employees suffer economic injuries as a result of unlawful employment discrimination. Thus, when Congress amended Title VII in 1972 to bring states within its coverage, it acted with the reasonable belief "that the employees of State and local governments are entitled to the same benefits and protections

in equal employment as are employees in the private sector." [29]

In short, the remedial provisions of Title VII, including those authorizing back pay and other retroactive monetary relief, are "an appropriate means of combatting the evil" (*South Carolina* v. *Katzenbach, supra,* 383 U.S. at 328) of discrimination in both public and private employment. They are therefore a legitimate exercise of Congress' "full remedial powers to effectuate the constitutional prohibition against" discrimination in employment (*id.* at 326), and the court of appeals erred in finding their enactment beyond Congress' authority in face of the defendant state's claim of sovereign immunity.

D. EDELMAN V. JORDAN IS INAPPLICABLE

In *Edelman* v. *Jordan,* 415 U.S. 651, this Court ruled that private plaintiffs could not recover retroactive welfare benefits wrongfully withheld by the state. That decision, however, did not address the argument under Section 5 of the Fourteenth Amendment presented here. Unlike the present situation, where Congress has authorized a private plaintiff's suit for retroactive monetary relief, in *Edelman* the Court found that "the threshold fact of congressional authorization to sue * * * is wholly absent" (*id.* at 672). Accordingly, that decision did not either expressly or by implication pass upon the issues that now face the Court.

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[29] Remarks by Senator Williams, 118 Cong. Rec. 1815 (1972); see *supra*, pp. 18–19.

In *Edelman* there were, within the overall issue of plaintiffs' entitlement to monetary relief, two distinct questions presented: (1) was the suit directly against the state for purposes of the Eleventh Amendment, or against state officials within the doctrine of *Ex parte Young*, 209 U.S. 123 (see 415 U.S. at 663–671); and (2) if it was a suit against the state, had whatever immunity that the state might otherwise enjoy been abrogated (see *id.* at 671–677). The doctrine announced in *Ex parte Young* did not override the Eleventh Amendment;[30] it declared, rather, that a suit to enjoin a state official from carrying out an unconstitutional statute was not a suit against the state for purposes of the Eleventh Amendment. See 209 U.S. at 150–160. In resolving the first question in *Edelman* then, the Court was merely characterizing the suit: if it were governed by *Ex parte Young* then the state's sovereign immunity was not implicated at all and the inquiry would come to an end; only if it were governed by the Eleventh Amendment would it be necessary to reach the question whether the state's immunity under that Amendment had been abrogated. The Court found *Ex parte Young* inapposite, and thus proceeded to the issue of abrogation.

[30] Although *Ex parte Young* arose out of a complaint brought under the Fourteenth Amendment by shareholders of a railroad seeking to enjoin enforcement of illegally confiscatory rates set by the state, the Court said that "a decision in this case does not require an examination or decision of the question whether [adoption of the Fourteenth Amendment] in any way altered or limited the effect of the [Eleventh] Amendment" (209 U.S. at 150).

In finding *Ex parte Young* inapplicable the Court to that extent overruled several of its previous decisions[31] in which retroactive monetary awards against states had been allowed (see 415 U.S. at 671), and the court of appeals in the instant case suggested (Pet. App. 22a–23a) that, since those decisions involved Fourteenth Amendment claims, in overruling them the Court may have foreclosed the arguments made herein. But the overruling of those cases, when considered in context, was meant merely to strip them of any support they may have lent to the notion that *Ex parte Young* authorized suits against states by private individuals seeking retroactive monetary relief. The Court's opinion in *Edelman* had not yet reached the question whether the state's immunity had been abrogated, and when it did the Fourteenth Amendment was never mentioned. In any event, neither *Edelman* v. *Jordan* nor the cases overruled therein involved an exercise of the congressional power under Section 5 of the Fourteenth Amendment to authorize appropriate remedies for enforcement of the Amendment's substantive provisions. Thus, in overruling those cases "to the extent that they are inconsistent with" the ruling on the *Ex parte Young* issue, the Court in *Edelman*

[31] *State Dept. of Health and Rehabilitative Services* v. *Zarate*, 407 U.S. 918, affirming 347 F. Supp. 1004 (S.D. Fla.); *Sterrett* v. *Mothers' and Children's Rights Organization*, 409 U.S. 809, affirming unreported order and judgment (N.D. Ind.) on remand from *Carpenter* v. *Sterrett*, 405 U.S. 971; *Gaddis* v. *Wyman*, 304 F. Supp. 717 (S.D. N.Y.), affirmed *sub nom.* *Wyman* v. *Bowens*, 397 U.S. 49; *Shapiro* v. *Thompson*, 394 U.S. 618.

(415 U.S. at 671) neither considered nor rejected the arguments made here.[32]

II

THE ELEVENTH AMENDMENT DOES NOT BAR THE AWARD OF ATTORNEY'S FEES AS PART OF THE COSTS IN A TITLE VII SUIT BROUGHT BY A STATE EMPLOYEE

Title VII expressly authorizes the district court to allow the prevailing party "a reasonable attorney's fee as part of the costs" of any enforcement action brought under the statute's provisions. Section 706(k), 42 U.S.C. 2000e–5(k). Here the district court found that "while the counsel fees requested are fair and reasonable in amount," they are "tantamount to an award of money damages" and therefore "are not allowable as a recoverable expense against the State" (Cross-Pet. App. 21a, 23a). The court of appeals reversed, holding that, under this Court's decision in *Edelman* v. *Jordan, supra,* an award of attorney's fees has only an "ancillary effect" on the state treasury and as such does not disturb the state's sovereign immunity within the meaning of the Eleventh Amendment (Pet. App. 23a–24a).

We submit that this ruling was correct. Under the long-standing doctrine of *Ex parte Young,* 209 U.S. 123, equitable relief may be secured against the enforcement of an unconstitutional state statute notwithstanding the cost of the litigation to the state as well as any incidental drain on the state treasury

[32] Indeed, Mr. Justice Marshall, dissenting, expressly noted that the relationship between the Fourteenth and Eleventh Amendments was not decided, see 415 U.S. at 694, n. 2.

resulting from the cost of compliance with the court's mandate. *Edelman* v. *Jordan, supra,* 415 U.S. at 668. An award of attorney's fees is in the same general category and is not, as the district court mistakenly believed, the equivalent of money damages designed to redress or punish past misconduct. Rather, attorney's fees are analytically similar to other litigation costs, which this Court has held may be taxed against states. *Fairmont Creamery Co.* v. *Minnesota,* 275 U.S. 70.

These principles, which underlie the ruling on this issue by the court of appeals here, were recognized by this Court when it approved *Sims* v. *Amos,* 340 F. Supp. 691 (M.D. Ala.), summarily affirmed, 409 U.S. 942, over the state's objection that the award of counsel fees against it violated its sovereign immunity.

Even if this Court should determine, however, that an award of attorney's fees in a case such as this one does not fall within the rationale of *Ex parte Young,* but instead amounts to an assessment against the state within the meaning of the Eleventh Amendment, the award is nonetheless within Congress' power to authorize for the reasons stated in the first part of this brief. The availability of counsel fees is essential to the remedial scheme of Title VII, and their authorization accordingly is an appropriate exercise of the enforcement powers granted to Congress by Section 5 of the Fourteenth Amendment.

A. AN AWARD OF ATTORNEY'S FEES HAS ONLY AN ANCILLARY EFFECT UPON THE STATE TREASURY

The Court in *Edelman* v. *Jordan, supra,* while acknowledging that "the difference between the type

of relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* will not in many instances be that between day and night" (415 U.S. at 667), nonetheless provided considerable guidance for distinguishing the two by describing the salient characteristics of each. The sort of relief that is barred is "a liability which must be paid from public funds" (*id.* at 663); "an accrued monetary liability which must be met from the general revenues" (*id.* at 664); "payment of a very substantial amount of money which * * * should have been paid, but was not" (*ibid.*); "'use [of] state funds to make reparation for the past'" (*id.* at 665); "retroactive payments" (*id.* at 666 n. 11); and "payment of state funds * * * as a form of compensation" (*id.* at 668). These characteristics lead to the general conclusion that money relief is barred when "it is in practical effect indistinguishable in many aspects from an award of damages against the State" (*ibid.*).

An award of attorney's fees does not share these characteristics. It is not akin to damages: it is intended neither to compensate the victims of nor to punish the state for past illegal conduct.

Rather, the award of counsel's fees is much closer to the sort of draw upon the state treasury, permitted by *Ex parte Young* and *Edelman* v. *Jordan,* which comes about as the "necessary consequence of compliance in the future with a substantive federal-question determination" (415 U.S. at 668; see also *id.* at 665). While the payment of attorney's fees is not identical to the increased funding of state programs

required as a practical matter in result of this Court's decisions in *Graham* v. *Richardson,* 403 U.S. 365, and *Goldberg* v. *Kelly,* 397 U.S. 254 (see 415 U.S. at 667–668), the differences militate in favor of the inclusion of attorney's fees among the genre of awards allowable. As the Court said in *Edelman* v. *Jordan,* "the fiscal consequences to state treasuries in these cases were the necessary result of compliance with decrees which by their terms were prospective in nature" (415 U.S. at 667–668). The prospect of an award of counsel fees, which generally speaking begin to accrue only at the outset of the litigation, is in many cases a necessary prerequisite to the bringing of the suit itself. If the Eleventh Amendment does not protect the states from having "to spend money from the state treasury" "in order to shape [its] conduct to the mandate of the Court's decrees," then surely it should not be the basis for defeating such suits in the first place, which would be the likely result of a rule barring awards of attorney's fees against the states. In short, such an award, like the fiscal consequence to the state resulting from the necessity to comply with a judicial decree, has only "an ancillary effect on the state treasury [which] is a permissible and often an inevitable consequence of the principle announced in *Ex parte Young*" (415 U.S. at 668).[33]

[33] See, in addition to the decision below, *Souza* v. *Travisono,* 512 F. 2d 1137 (C.A. 1); *Class* v. *Norton,* 505 F. 2d 123, 125 (C.A. 2); *Jordan* v. *Fusari,* 496 F. 2d 646, 651 (C.A. 2); *Sims* v. *Amos,* 340 F. Supp. 691, affirmed, 409 U.S. 942. The Seventh Circuit follows the same rule, finding *Sims* v. *Amos, supra,* controlling, *Bond* v. *Stanton,* No. 75–1459, decided January 7,

This result in many respects merely restates the doctrine of *Fairmont Creamery Co.* v. *Minnesota,* 275 U.S. 70, where the state attempted to assert its sovereignty as a bar to an award of costs against it.[34] This Court held that it was justified "in treating the state just as any other litigant and in imposing costs upon it as such" (*id.* at 77) since the case was brought not

1976, as does the Ninth, *Brandenburger* v. *Thompson*, 494 F. 2d 885. See also *Boston Chapter N.A.A.C.P., Inc.* v. *Beecher*, 504 F. 2d 1017 (C.A. 1), certiorari denied, 421 U.S. 910.

The rule in the Fifth Circuit is unsettled, see *Gates* v. *Collier*, 522 F. 2d 81, and *Newman* v. *State of Alabama*, 522 F. 2d 71, both decided October 29, 1975 (*en banc*), vacating the judgment of the district court in each case as it related to attorney's fees and remanding for reconsideration in light of this Court's decisions in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, and *Edelman* v. *Jordan*, *supra*.

The Sixth Circuit has held that a state's immunity bars an award of attorney's fees, *Jordon* v. *Gilligan*, 500 F. 2d 701, certiorari denied, 421 U.S. 991, relying on *Skehan* v. *Board of Trustees of Bloomsburg State College*, 501 F. 2d 31 (C.A. 3), vacated and remanded for further consideration in light of *Alyeska Pipeline Service Co.* v. *Wilderness Society*, *supra*, and *Wood* v. *Strickland*, 420 U.S. 308, 421 U.S. 983. A subsequent Sixth Circuit decision to like effect, *Taylor* v. *Perini*, 503 F .2d 899, was vacated and remanded for futher consideration in light of *Alyeska Pipeline Service Co.* v. *Wilderness Society*, *supra*, alone, 421 U.S. 982.

[34] At least where, as here, the underlying statute provides for an award of attorney's fees, we perceive no analytical difference between costs and attorney's fees for purposes of considering whether they are allowed by *Ex parte Young* or barred by the Eleventh Amendment. See *Souza* v. *Travisono*, *supra*, 512 F. 2d at 1140; *Class* v. *Norton*, *supra*, 505 F. 2d at 125; *Taylor* v. *Perini*, *supra*, 503 F. 2d at 909 (Edwards, J., dissenting). Indeed, the applicable statutory provision here, Section 706(k), 42 U.S.C. 2000e–5(k), provides for an award of attorney's fees "as part of the costs."

"by the state's consent but by virtue of a law, to which it is subject. Though a sovereign, in many respects, the state when a party to litigation in this Court loses some of its character as such" (275 U.S. at 74). It should be no different in any federal court. "[T]o the extent states and state officials are, under our federal system, amenable to suit in federal courts, they should be responsible for costs and fees incidental to litigation to the same degree as others" (*Souza* v. *Travisono,* 512 F. 2d 1137, 1140 (C.A. 1)).

Indeed, this Court has already affirmed a decision reaching this result, *Sims* v. *Amos,* 340 F. Supp. 691 (M.D. Ala.), summarily affirmed, 409 U.S. 942. There the district court taxed attorney's fees against the state, ruling that a state was without immunity in suits brought under the doctrine of *Ex parte Young*. In its jurisdictional statement the state protested the award as an unlawful abrogation of its sovereign immunity, and this Court's affirmance therefore should be read as having passed on the merits of that issue.[35] Cf. *Hicks* v. *Miranda,* 422 U.S. 332, 344–345.

[35] The Seventh Circuit so held in *Bond* v. *Stanton*, *supra*, note 33. *Brandenburger* v. *Thompson*, *supra*, 494 F. 2d at 888, also relied on *Sims* v. *Amos* in holding attorney's fees allowable. See also *Taylor* v. *Perini*, *supra*, 503 F. 2d at 907–908 (Edwards, J., dissenting) (affirmance in *Sims* binding); *Newman* v. *State of Alabama*, *supra*, 522 F. 2d at 72–80 (Gewin, Brown, Wisdom, Thornberry, Goldberg, J.J., dissenting from remand for reconsideration of attorney's fees issue) (*semble*). Contra, *Skehan* v. *Board of Trustees of Bloomsburg State College*, *supra*, 501 F. 2d at 42 n. 7; *Jordon* v. *Gilligan*, *supra*, 500 F. 2d at 706–709; *Taylor* v. *Perini*, *supra*, 503 F. 2d at 905 (by implication).

B. CONGRESS HAS THE POWER UNDER THE FOURTEENTH AMENDMENT TO PROVIDE FOR AN AWARD OF ATTORNEY'S FEES AGAINST A STATE

If this Court should decide, contrary to the foregoing argument, that an award of attorney's fees has more than an ancillary effect upon the state treasury, and is not protected by the doctrine of *Ex parte Young* from the state's claim of sovereign immunity, then the question becomes whether Congress has the power under the Fourteenth Amendment to provide for such awards as an essential element of a statutory scheme to enforce that Amendment's guarantees. For the reasons stated in point I, *supra,* we submit that Congress has such authority.

Title VII was designed to be "a comprehensive solution for the problem of invidious discrimination in employment" (*Johnson* v. *Railway Express Agency, Inc.,* 421 U.S. 454, 459). Although both the Equal Employment Opportunity Commission and the Attorney General are given enforcement responsibilities (see *supra,* pp. 14–15), Congress intended that aggrieved employees would play a central role in the statutory scheme and to that end provided "assistance in investigation, conciliation, counsel, waiver of court costs, and attorneys' fees" (*id.* at 460). Indeed, "the private right of action remains an essential means of obtaining judicial enforcement of Title VII. * * * In such cases, the private litigant not only redresses his own injury but also vindicates the important congressional policy against discriminatory employment practices" (*Alexander* v. *Gardner-Denver Co.,* 415 U.S. 36, 45). Thus, this is an instance where "Congress has opted to rely

heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation" (*Alyeska Pipeline Service Co.* v. *Wilderness Society, supra,* 421 U.S. at 263).

In so doing, Congress reasonably exercised its authority to enforce the prohibitions of the Fourteenth Amendment by appropriate legislation. *Ex parte Virginia, supra,* 100 U.S. at 346. The resources of the Executive Branch are inadequate to alleviate fully the "historic evil of national proportions" of employment discrimination (*Albemarle Paper Co.* v. *Moody, supra,* 422 U.S. at 416), and private enforcement is thus essential to vindication of the congressional goal of "eradicating discrimination throughout the economy" (*id.* at 421). Private litigants cannot be expected to play the critical role envisaged for them, however, if access to the judicial forum is effectively denied or even discouraged by the prospect that financial hardship will accompany their efforts. This is especially true in cases where only injunctive relief is sought, but even a private litigant who seeks back pay or other monetary relief may be unwilling to risk the possibility that attorney's fees will substantially offset or even exceed the amount of any monetary recovery.

In *Albemarle Paper Co.* v. *Moody, supra,* 422 U.S. at 415, this Court recognized the "strong public interest" in private enforcement of Title VII, and noted that this interest "can be vindicated by applying" to the attorney's fees provision of Title VII the standards enunciated in *Newman* v. *Piggie Park Enter-*

prises, Inc., 390 U.S. 400, for the award of attorney's fees under Section 204(b) of Title II of the Civil Rights Act of 1964, 78 Stat. 244, 42 U.S.C. 2000a-3(b). In that case the Court stated (390 U.S. at 401–402; footnote omitted):

> When the Civil Rights Act of 1964 was passed, it was evident that enforcement would prove difficult and that the Nation would have to rely in part upon private litigation as a means of securing broad compliance with the law. * * * If successful plaintiffs were routinely forced to bear their own attorneys' fees, few aggrieved parties would be in a position to advance the public interest by invoking the injunctive powers of the federal courts. Congress therefore enacted the provision for counsel fees—not simply to penalize litigants who deliberately advance arguments they know to be untenable but, more broadly, to encourage individuals injured by racial discrimination to seek judicial relief under Title II.

Thus, the availability of attorney's fees is integral to the enforcement of Title VII, and in providing for them Congress chose a "rational means to effectuate the constitutional prohibition of" discrimination in employment (*South Carolina* v. *Katzenbach, supra,*

383 U.S. at 324). The provision is, accordingly, an appropriate exercise of the enforcement power conferred on Congress by Section 5 of the Fourteenth Amendment; it follows that the award of attorney's fees here is not barred by the state's claim of sovereign immunity.

CONCLUSION

The judgment below should be reversed insofar as it disallows an award of retroactive monetary relief against the state, and affirmed insofar as it allows an award of attorney's fees.

Respectfully submitted.

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APPENDIX

EXCERPTS FROM CONGRESSIONAL DEBATES ON THE RECONSTRUCTION AMENDMENTS AND IMPLEMENTING LEGISLATION

I. THE THIRTEENTH AMENDMENT

A. Congressman Chilton A. White, speaking in opposition (Cong. Globe, 38th Cong., 2d Sess. 215 (1865)):

> Sir, I am a believer to the fullest extent in that doctrine which has been denounced upon this floor as a damnable heresy—the absolute, unqualified sovereignty of the States. And I believe it is because these States are absolutely and exclusively sovereign that they may, in the exercise of their sovereignty delegated to conventions for the purpose, dispose of this institution of slavery, and that, too, consistently with this provision written down in the tenth amendment of the Constitution of the United States.

B. Congressman Samuel S. Cox, speaking in opposition (Cong. Globe, 38th Cong., 2d Sess. 242 (1865)):

> Do you not break down, by this amendment, the distinction between the spheres of the State and national Governments, which is characteristic of our system, as old as our Union? If so, are we not asked to change the system, rather than to abolish slavery?
>
> Hence, I do not place my suggestions about this measure on any ground of the immutability of the Constitution, or of our peculiar system. I place my vote against it, because the system it would change is a good one, made in wisdom and to be perpetuated for the future happiness of the people. If the system of internal police over State matters is not of value, discard it altogether. Deny to Ohio her right to declare

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who are born in wedlock, and who may inherit estates; deny to us the right to have our home courts for home justice; centralize all power here, in one head, and make the federation a despotic tyranny, and thus you will have the "gospel of anarchy, the philosophy of dissolution."

C. Congressman Anson Herrick, speaking in support (Cong. Globe, 38th Cong., 2d Sess. 525 (1865)):

> By the adoption of that Constitution the States transferred to three fourths of their number their entire sovereignty, which can be at any time exerted to augment or diminish the functions of the General Government, save in the two particulars excepted by special limitation. Three fourths of the States can, by an amendment of the Constitution, exercise throughout the United States any power that a State individually can exercise within its own limits.

II. THE FOURTEENTH AMENDMENT

A. Congressman Andrew J. Rogers, a member of the Joint Committee on Reconstruction, which reported out the Amendment, speaking in opposition (Cong. Globe, 39th Cong., 1st. Sess., App. 134–135 (1866)):

> This is but another attempt to consolidate the power of the States in the Federal Government. It is another step to an imperial despotism. It is but another attempt to blot out from that flag the eleven stars that represent the States of the South and to consolidate in the Federal Government, by the action of Congress, all the powers claimed by the Czar of Russia or the Emperor of the French. * * *
>
> * * * * *
>
> But this act of Congress proposes to amend the Constitution so as to take away the rights of the States with regard to the life, liberty,

> and property of the people, so as to enable and empower Congress to pass laws compelling the abrogation of all the statutes of the States which makes a distinction, for instance, between a crime committed by a white man and a crime committed by a black man, or allow white people privileges, immunities, or property not allowed to a black man.
>
> * * * * *
>
> All men who are honest, and love their country, and who believe in the doctrines upon which the constitutional liberty of this country is founded, must admit that the rights of the States were the most jealous rights which our fathers had in view; and when they wrested from England the independence of the several States, they wrested them as thirteen independent States and nations, free from each other, with all rights and privileges given to the people to exercise, carry into effect, and control a Government according to their own exclusive will and judgment.

B. Congressman Robert S. Hale, speaking in opposition (Cong. Globe, 39th Cong., 1st Sess. 1063–1065 (1866)):

> It does seem to me that the tenor and effect of the amendment proposed here by this committee is to bring about a more radical change in the system of this Government, to institute a wider departure from the theory upon which our fathers formed it than ever before was proposed in any legislative or constitutional assembly. * * *
>
> * * * * *
>
> What is the effect of the amendment which the committee on reconstruction propose for the sanction of this House and the States of the Union? I submit that it is in effect a provision under which all State legislation, in its codes of civil and criminal jurisprudence and procedure,

affecting the individual citizen, may be overridden, may be repealed or abolished, and the law of Congress established instead. I maintain that in this respect it is an utter departure from every principle ever dreamed of by the men who framed our Constitution.

* * * * *

It was not within the purview of the original Constitution to grant the power of legislation to Congress on subjects of this character. Mr. Speaker, the powers conferred on Congress are all contained in the eighth section of the first article of the Constitution. I ask the House to look at these provisions, their nature, their general scope, the accuracy, precision, and care with which they are defined, and compare them with what I cannot but characterize, with all my respect and deference for the committee on reconstruction, as the extremely vague, loose, and indefinite provisions of the proposed amendment.

* * * * *

I believe that this is, of all times, the last when we should undertake a radical amendment of the Constitution, so immensely extending the power of the Federal Government, and derogating from the power of the States.

* * * But let me warn gentlemen that there are other liberties as important as the liberties of the individual citizen, and those are the liberties and rights of the States. * * * I appeal to gentlemen whether we ought not now to seek to strengthen the liberties of the States and the rights of the States as well as the liberties of the citizen.

C. Congressman Thomas T. Davis, speaking in opposition (Cong. Globe, 39th Cong., 1st Sess. 1083 (1866)):

> I am, moreover, especially opposed to any amendment which may prove subversive of the principles on which the Government is founded. We are the Representatives of States in this Union, and as such are under solemn obligations to see that while the national sovereignty of the Union is preserved, no infringement on the reserved rights of the States shall be permitted.

D. Congressman Frederick E. Woodbridge, speaking in support (Cong. Globe, 39th Cong., 1st Sess. 1088 (1866)):

> It does not destroy the sovereignty of a State, if such a thing exists. It does not even affect its sovereign rights, but merely keeps whatever sovereignty it may have in harmony with a republican form of government and the Constitution of the country.

E. Congressman John A. Bingham, who was a member of the Joint Committee on Reconstruction and who drafted what are now Sections One and Five of the Amendment, speaking in support (Cong. Globe, 39th Cong., 1st Sess. 1088–1090 (1866)):

> I repel the suggestion made here in the heat of debate, that the committee or any of its members who favor this proposition seek in any form to mar the Constitution of the country, or take away from any State any right that belongs to it, or from any citizen of any State any right that belongs to him under that Constitution. The proposition pending before the House is simply a proposition to arm the Congress of the United States, by the consent of the people of the United States, with the power to enforce the bill of rights as it stands in the Constitution today. * * *
>
> * * * * *
>
> But the gentleman reiterates the old cry of State rights, and says, "You are impairing State rights." I would like to know, and when the gentleman comes to make another argument

on this subject, I respectfully ask him to inform us whence he derives the authority for supposing, if he does so suppose, that any State has the right to deny to a citizen of any other State any of the privileges or immunities of a citizen of the United States. And if a State has not the right to do that, how can the right of a State be impaired by giving to the people of the United States by constitutional amendment the power by congressional enactment to enforce this provision of their Constitution?

* * * * *

The question is, simply, whether you will give by this amendment to the people of the United States the power, by legislative enactment, to punish officials of States for violation of the oaths enjoined upon them by their Constitution? That is the question, and the whole question. The adoption of the proposed amendment will take from the States no rights that belong to the States. They elect their Legislatures; they enact their laws for the punishment of crimes against life, liberty, or property; but in the event of the adoption of this amendment, if [State officials] conspire together to enact laws refusing equal protection to life, liberty, or property, the Congress is thereby vested with power to hold them to answer before the bar of the national courts for the violation of their oaths and of the rights of their fellow-men.

F. Congressman John A. Nicholson, speaking in opposition (Cong. Globe, 39th Cong., 1st Sess. 2080 (1866)):

> Thus we possess a system of government, which, to a foreign observer, may appear artificial and complex, but which to us, who are furnished with the key, is simple in the extreme. That key is the jealousy which has been apparent through all our history, for the right of each State to control its own domestic affairs, and

> the firmness with which that right has always been maintained.
>
> From all these various conflicting causes harmony has been evoked; and the most perfect equilibrium is presented to our view in the equal distribution of the Federal powers, in the limitation upon State and Federal power, and the line that is drawn between them; like that huge mass of rock which nature has so nicely poised that a child's hand can disturb its balance, but a giant's strength could not move it from its base.
>
> That nicely adjusted balance is now, by this amendment, to be permanently overthrown. The line of demarkation between State and Federal power, which has been already too much obscured by the great latitude of construction given of late to the several grants of power, is now to be entirely obliterated.

G. Congressman Thaddeus Stevens, a member of the Joint Committee on Reconstruction, speaking in support (Cong. Globe, 39th Cong., 1st Sess. 2459 (1866)):

> I can hardly believe that any person can be found who will not admit that every one of these provisions is just. They are all asserted, in some form or other, in our DECLARATION or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate *equally* upon all.

H. Congressman John M. Broomall, speaking in support (Cong. Globe, 39th Cong., 1st Sess. 2498 (1866)):

> We propose, first, to give power to the Government of the United States to protect its own citizens within the States, within its own juris-

diction. Who will deny the necessity of this? No one.

I. Congressman Thomas D. Eliot, speaking in support (Cong. Globe, 39th Cong., 1st Sess. 2511 (1866)):

> I support the first section [36] because the doctrine it declares is right, and if, under the Constitution as it now stands, Congress has not the power to prohibit State legislation discriminating against classes of citizens or depriving any persons of life, liberty, or property without due process of law, or denying to any persons within the States the equal protection of the laws, then, in my judgment, such power should be distinctly conferred.

J. Congressman Andrew J. Rogers of the Joint Committee on Reconstruction, speaking in opposition (Cong. Globe, 39th Cong., 1st Sess. 2538 (1866)):

> Now, sir, I have examined these propositions with some minuteness, and I have come to the conclusion different to what some others have come, that the first section of this programme of disunion [37] is the most dangerous to liberty. It saps the foundation of the Government; it destroys the elementary principles of the States; it consolidates everything into one imperial despotism; it annihilates all the rights which lie at the foundation of the Union of the States, and which have characterized this Government and made it prosperous and great during the long period of its existence.
>
> This section of the joint resolution is no more nor less than an attempt to embody in the Constitution of the United States that outrageous and miserable civil rights bill which passed both Houses of Congress and was vetoed

[36] Sections 1 and 5 of the Fourteenth Amendment were at that time consolidated in the first section of the proposed resolution.

[37] See note 36.

> by the President of the United States upon the ground that it was a direct attempt to consolidate the power of the States and to take away from them the elementary principles which lie at their foundation.

K. Congressman John A. Bingham, speaking in support (Cong. Globe., 39th Cong., 1st Sess. 2542–2543 (1866)):

> The necessity for the first section of this amendment [38] to the Constitution, Mr. Speaker, is one of the lessons that have been taught to your committee and taught to all the people of this country by the history of the past four years of terrific conflict—that history in which God is, and in which He teaches the profoundest lessons to men and nations. There was a want hitherto, and there remains a want now, in the Constitution of our country, which the proposed amendment will supply. What is that? It is the power in the people, the whole people of the United States, by express authority of the Constitution to do that by congressional enactment which hitherto they have not had the power to do, and have never even attempted to do; that is, to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.
>
> Allow me, Mr. Speaker, in passing, to say that this amendment takes from no State any right that ever pertained to it. No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy.
>
> * * * * *

[38] See p. 58 n. 36, *supra*.

> That great want of the citizen and stranger, protection by national law from unconstitutional State enactments, is supplied by the first section of this amendment. That is the extent that it hath, no more; and let gentlemen answer to God and their country who oppose its incorporation into the organic law of the land.

L. Senator Jacob M. Howard, a member of the Joint Committee on Reconstruction, speaking in support (Cong. Globe, 39th Cong., 1st Sess. 2765–2766 (1866)):

> Now, sir, here is a mass of privileges, immunities, and rights, some of them secured by the second section of the fourth article of the Constitution, which I have recited, some by the first eight amendments of the Constitution; and it is a fact well worthy of attention that the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guarantied by the Constitution or recognized by it, are secured to the citizen solely as a citizen of the United States and as a party in their courts. They do not operate in the slightest degree as a restraint or prohibition upon State legislation. * * *
>
> Now, sir, there is no power given in the Constitution to enforce and to carry out any of these guarantees. They are not powers granted by the Constitution to Congress, and of course do not come within the sweeping clause of the Constitution authorizing Congress to pass all laws necessary and proper for carrying out the foregoing or granted powers, but they stand simply as a bill of rights in the Constitution, without power on the part of Congress to give them full effect; while at the same time the States are not restrained from violating the principles embraced in them except by their own local constitutions, which may be altered from year to year. The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel

> them at all times to respect these great fundamental guarantees. How will it be done under the present amendment? As I have remarked, they are not powers granted to Congress, and therefore it is necessary, if they are to be effectuated and enforced, as they assuredly ought to be, that additional power should be given to Congress to that end. This is one by the fifth section of this amendment, which declares that "the Congress shall have power to enforce by appropriate legislation the provisions of this article." Here is a direct affirmative delegation of power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution.

M. Senator Luke P. Poland, speaking in support of the Fourteenth Amendment (Cong. Globe, 39th Cong., 1st Sess. 2961 (1866)):

> The clause of the first proposed amendment, that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," secures nothing beyond what was intended by the original provision in the Constitution, that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."
>
> But the radical difference in the social systems of the several States, and the great extent to which the doctrine of State rights or State sovereignty was carried, induced mainly, as I believe, by and for the protection of the peculiar system of the South, led to a practical repudiation of the existing provision on this subject, and it was disregarded in many of the States. State legislation was allowed to override it, and as no express power was by the Constitution granted to Congress to enforce it, it became really a dead letter. The great social and political change in the southern States wrought by the amendment of the Constitution abolish-

ing slavery and by the overthrow of the late rebellion render it eminently proper and necessary that Congress should be invested with the power to enforce this provision throughout the country and compel its observance.

* * * * *

It certainly seems desirable that no doubt should be left existing as to the power of Congress to enforce principles lying at the very foundation of all republican government if they be denied or violated by the States, and I cannot doubt but that every Senator will rejoice in aiding to remove all doubt upon this power of Congress.

N. Senator Garrett Davis, speaking in opposition (Cong. Globe, 39th Cong., 1st Sess., App. 240 (1866)):

> The next branch, "nor shall any State deprive any person of life, liberty, or property without due process of law," is objectionable, because in relation to her own citizens it belongs to each State exclusively, as being of her own reserved sovereignty and rights, to regulate that matter.

O. Congressman Jehu Baker, speaking in support of the due process and equal protection clauses of the Fourteenth Amendment (Cong. Globe, 39th Cong., 1st Sess., App. 256 (1866)):

> How clearly right and necessary to liberty is this! The Constitution already declares generally that no person shall "be deprived of life, liberty, or property without due process of law." This declares particularly that no *State* shall do it—a wholesome and needed check upon the great abuse of liberty which several of the States have practiced, and which they manifest too much purpose to continue.

III. ANTI-KU KLUX KLAN BILL

A. Congressman John A. Bingham, speaking of the effect of the Reconstruction Amendments (Cong. Globe, 42d Cong., 1st Sess., App. 83–85 (1871)).

> The powers of the States have been limited and the powers of Congress extended by the last three amendments of the Constitution. These last amendments—thirteen, fourteen, and fifteen—do, in my judgment, vest in Congress a power to protect the rights of citizens against States, and individuals in States, never before granted. It is my purpose, as far as I may be able in the limited time allowed me, to make this statement good.
>
> * * * * *
>
> The fourteenth amendment concludes as follows:
>
> "The Congress shall have power, by appropriate legislation to enforce the provisions of this article."
>
> This is the grant of power. It is full and complete. The gentleman says that amendment differs from the amendment reported by me in February; differs from the provision introduced and written by me, now in the fourteenth article of amendments. It differs in this: that it is, as it now stands in the Constitution, more comprehensive than as it was first proposed and reported in February, 1866. It embraces all and more than did the February proposition.
>
> * * * * *
>
> Let gentlemen consider the last three amendments and the new limitations thereby imposed upon the power of the States, and the new powers thereby vested in Congress. The first of

these (the thirteenth) provides that involuntary servitude, or slavery, shall not exist in the United States. That is negative. Then we have the further provision that Congress shall have power to enforce, by appropriate legislation, this amendment. That is affirmative. Do gentlemen undertake to say to day that this does not impose a new limitation upon the power of the States, and grant a new power to Congress?

Does the gentleman from Indiana [Mr. KERR] wish to be understood as affirming that there is no new grant of power here to Congress and no new limitation on the State? I rather think not.

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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-251

GARLAND M. FITZPATRICK, *et al.*,

Petitioners,

v.

FREDERICK BITZER, *et al.*

BRIEF FOR THE LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, AND THE AMERICAN CIVIL LIBERTIES UNION, AS *AMICI CURIAE*

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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-251

GARLAND M. FITZPATRICK, *et al.*,

Petitioners,

v.

FREDERICK BITZER, *et al.*

BRIEF FOR THE LAWYERS COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, AND THE AMERICAN CIVIL LIBERTIES UNION, AS *AMICI CURIAE*

INTEREST OF AMICI CURIAE*

The Lawyers Committee for Civil Rights Under Law is a non-profit corporation organized in 1963 at the request of President Kennedy; its Board of Trustees includes thirteen past presidents of the American Bar Association, three former Attorneys General, and two former Solicitors General of the United States. The Committee's primary mission is to involve private lawyers throughout the country in the quest of all citizens to secure their civil rights through the legal process.

The National Association for the Advancement of Col-

* This brief is filed, pursuant to Rule 42(2), with the consent of the parties.

ored People (NAACP) is a non-profit membership association representing the interests of approximately 500,000 members in 1800 branches throughout the United States. Since 1909, the NAACP has sought through the courts to establish and protect the civil rights of minority citizens.

The Mexican American Legal Defense and Educational Fund was established in 1968. Its primary objective is to secure the civil rights of Mexican Americans through litigation and education.

The American Civil Liberties Union is a nation-wide, non-partisan organization of over 250,000 members dedicated to protecting the civil liberties of all persons including, *inter alia,* the right of all persons to equal treatment under the law.

The issue in this case is whether, consistent with the Eleventh Amendment, state employees may secure monetary relief in private actions when they have suffered discrimination in violation of Title VII of the Civil Rights Act of 1964. Each of the *amici* has a vital interest in the resolution of this issue.

This brief is filed to provide the Court with the views of *amici,* refined through extensive litigation under Title VII and the Fourteenth Amendment, that the Eleventh Amendment is not a barrier to the private cause of action against states for complete relief from prior discrimination, including backpay, created by Congress in the 1972 amendments to Title VII.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 1972, Congress amended Title VII to extend its protections against discrimination to employees of state and local governments. With unmistakable clarity, Congress evinced an intention to create two separate mechanisms for

enforcement of these protections: (1) a suit by the Attorney General to recover injunctive relief and backpay for employees who have suffered unlawful discrimination; and (2) a suit by the injured employees themselves, if the Attorney General does not act within 180 days of the filing of a charge, to recover that same relief for their own benefit.[1]

No one disputes Congress' power to impose the *substantive* prohibitions of Title VII upon the states. The 1972 amendments, as Congress explained in enacting them, were an exercise of the power conferred by Section 5 of the Fourteenth Amendment "to enforce, by appropriate legislation, the provisions of this article."[2]

Nor does anyone dispute Congress' authority to authorize suits in federal court by the Attorney General to recover backpay on behalf of discriminatees. "[S]uits by the United States against a State are not barred by the Constitution." *Employees* v. *Missouri Public Health Dept.*, 411 U.S. 279, 285-286 (1973) (recognizing Congress' power to authorize suits by the Secretary of Labor to recover unpaid minimum wages and unpaid overtime compensation withheld by states from hospital and school employees in violation of the Fair Labor Standards Act).[3]

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[1] Sections 706(f)(1) and (g), 42 U.S.C. §2000e-5(f)(1) and (g). See also "Legislative History of the Equal Employment Opportunity Act of 1972," published by the Senate Committee on Labor and Public Welfare (hereinafter "Leg. Hist."), pp. 1815-16, 1847. Congress additionally provided that if the employees themselves bring the suit, and are successful, they may be awarded attorneys fees. Section 706(g), 42 U.S.C. §2000e-5(g).

[2] Leg. Hist. 79, 420, 1173-74.

[3] See also *Edelman* v. *Jordan*, 415 U.S. 651, 669 (1974); *United States* v. *Mississippi*, 380 U.S. 128, 140-141 (1965); *United States* v. *Texas*, 143 U.S. 621, 643-646 (1892); *Brennan* v. *Iowa*, 494 F.2d 100, 103 (8th Cir. 1974), cert. denied 421 U.S. 1015 (1975); *Dunlop* v. *State of New Jersey*, 522 F.2d 504, 515-516 (3rd Cir. 1975). And see the decision below, *Fitzpatrick* v. *Bitzer*, 519 F.2d 559, 570 (2nd Cir. 1975).

But the Eleventh Amendment has been invoked, and construed by the court below, to invalidate that portion of the 1972 amendments by which Congress created a *private* cause of action for backpay against state governments (albeit not, presumably, against local governments which do not enjoy the protection of the Eleventh Amendment[4]). The practical consequences of that ruling, if upheld, are awesome.

There are millions of state employees,[5] and Congress found that employment discrimination against them is

[4] It is hornbook law that a "suit against a county, a municipality, or other lesser governmental unit is not regarded as a suit against a state within the meaning of the Eleventh Amendment." Hart and Wechsler, *The Federal Courts and the Federal System,* 690 (2nd Ed. 1973). See, e.g., *County of Lincoln* v. *Luning,* 133 U.S. 529, 530 (1890); *Hopkins* v. *Clemson Agricultural College,* 221 U.S. 636 (1911); *Kennecott Copper Corp.* v. *State Tax Commission,* 327 U.S. 573, 579 (1946); *Edelman* v. *Jordan,* 415 U.S. 651, 667 n. 12 (1974); *Incarcerated Men of Allen County Jail* v. *Fair,* 507 F.2d 281, 287 (6th Cir. 1974); *Hander* v. *San Jacinto Junior College,* 519 F.2d 273, 279 (5th Cir. 1975); *Singer* v. *Mahoning County Board of Mental Retard.,* 519 F.2d 748, 749 (6th Cir. 1975); *Burt* v. *Board of Trustees of Edgefield Cty. Sch. D.,* 521 F.2d 1201, 1205 (4th Cir. 1975); *Hostrop* v. *Bd. of Jr. College Dist. No. 515,* 523 F.2d 569, 577 n. 3 (7th Cir. 1975); *Hutchison* v. *Lake Oswego School District,* F.2d , 11 FEP Cases 161, 165 (9th Cir. 1975). In the instant case, the court below concluded that the State Employees' Retirement Commission is the "alter ego" of the State, and thus enjoys whatever immunity the Eleventh Amendment provides the State of Connecticut (519 F.2d at 564-565). Petitioners have not sought review of that holding, and accordingly our brief assumes *arguendo* that respondents are "the state" for Eleventh Amendment purposes.

[5] Congress found that there are more than ten million employees of state and local governments. Leg. Hist. 77, 418. The congressional data does not indicate how much of the total represents employees of the states, or of agencies which are the "alter ego" of the states and thus share the states' Eleventh Amendment immunity, but the figure surely is in the millions.

"more pervasive than in the private sector."[6] It is a central purpose of Title VII "to make persons whole for injuries suffered on account of unlawful employment discrimination," *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 418 (1975), a purpose which in most cases cannot be achieved without backpay, *Id.* at 418-421. It is also the purpose of Title VII to prompt employers to discard their discriminatory practices, a purpose with which backpay has "an obvious connection," *Id.* at 417.[7]

Congress, deeming these considerations equally applicable to state employers, made backpay available against the states. Congress also made the judgment, given the multitude of potential claims by state employees, *not* to make the Attorney General the *sole* prosecutor of Title VII claims on behalf of such employees. Declaring that preservation of the discriminatee's cause of action was "paramount,"[7a]

[6] Leg. Hist. 77-78, 418-419. Congress relied in part upon a report of the U.S. Commission on Civil Rights, *For All the People . . . By All the People* (1969). The report "examined equal employment opportunity in public employment in seven urban areas located throughout the country—North as well as South" (Leg. Hist. 77). The House Committee summarized the report's findings as follows (*ibid.*):

> The report's findings indicate that widespread discrimination against minorities exists in State and local government employment, and that the existence of this discrimination is perpetuated by the presence of both institutional and overt discriminatory practices. The report cites widespread perpetuation of past discriminatory practices through *de facto* segregated job ladders, invalid selection techniques, and stereotyped misconceptions by supervisors regarding minority group capabilities.

[7] "If employers faced only the prospect of an injunctive order, they would have little incentive to shun practices of dubious legality. It is the reasonably certain prospect of a backpay award that 'provide[s] the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history'." *Id.* at 417-418, quoting *United States* v. *N.L. Industries, Inc.,* 479 F.2d 354, 379 (8th Cir. 1973).

[7a] Leg. Hist. 1847.

Congress expressly conferred a private cause of action whenever the Attorney General has not sued within 180 days of the filing of an employee's charge.

Invalidation of the private cause of action for backpay would mean either that Title VII's objectives would go partially unfulfilled, or that Congress would have to appropriate the additional sums necessary to enable the Attorney General to institute actions wherever a valid claim of discrimination existed. Whether the Eleventh Amendment subjects Congress to this Hobson's choice is the issue posed by this case.

We show in this brief that Title VII's private cause of action for backpay does *not* contravene the Eleventh Amendment. Our showing proceeds upon the following analysis:

Immunity from suit is an attribute of sovereignty. While the states retained their sovereignty over most matters upon entering the Union, they yielded their sovereignty to the extent that the Constitution conferred powers upon the national government—powers which were declared to be "supreme".

As originally adopted, however, Article III, Section 2 of the Constitution—which defined the federal judicial power—encroached upon state sovereignty in greater respects than did the remainder of the document. For in addition to creating judicial power over all federal questions—a power which was understood to embrace federal question claims against the states, and which excited no controversy as it was wholly consistent with the cession of sovereignty made by the states in joining the Union—it also created judicial power over *state law* "controversies . . . between a State and citizens of another State . . . and between a State . . . and foreign states, citizens or subjects." This provision *did* excite controversy, for read literally it trespassed upon the sovereignty retained by the states: the states would become suable in federal court upon "state law" claims which they had not consented to entertain in their own courts.

In urging ratification of the Constitution, supporters assured the states that the "diversity" clause was not to be read literally: it was not intended to depart from the general principle that a sovereign is immune from suit absent consent, and thus it would allow "state law" suits against states only where not inconsistent with their sovereignty, i.e., where they had consented to suit. That promise proved short-lived, however, for in *Chisholm* v. *Georgia,* 2 U.S. 419 (1793), four of the Court's five justices construed the diversity clause literally, to confer federal judicial power over *any* claim against a state by a non-citizen of that state. Only the lone dissenter, Justice Iredell, would have confined the diversity clause to state-law claims upon which the states had consented to suit. (Significantly, Justice Iredell recognized and approved Congress' power to create federal jurisdiction over *federal question* claims against the states).

The Eleventh Amendment was a reaction to *Chisholm.* It was designed to reinstate the original understanding of the diversity clause, to which only Justice Iredell had adhered in *Chisholm.* The wording of the Amendment—which speaks in diversity terms—is no accident; it defines the metes and bounds of the alteration which its framers sought to accomplish. There is no historical evidence that the Amendment was intended to withdraw federal judicial power over federal question claims against states, and indeed such a withdrawal would have been wholly inconsistent with the Amendment's objective: to restore the states' "sovereign" immunity from suit. The framers of the Amendment would surely have chosen different words if their intention had been to preclude *all* suits against states, for they were aware that all who had articulated the "original understanding" which they sought to reinstate—including Justice Iredell—had approved the existence of federal

judicial power over federal question claims against the states.

In *Cohens* v. *Virginia,* 19 U.S. 264 (1821), Chief Justice Marshall confirmed that the Eleventh Amendment had *not* withdrawn federal judicial power over federal question claims against states. But 69 years later, in *Hans* v. *Louisiana,* 134 U.S. 1 (1890), the Court declared otherwise. Although the *Hans* Court might have decided the case before it on narrower grounds, it announced that states could *never* be sued in federal court without their consent. This conclusion was premised upon a wholly erroneous reading of the historical and judicial precedents. This Court has subsequently recognized that, whatever the correctness of the holding in *Hans* on the narrow issue presented there, its broad declaration of universal immunity will not be followed when it collides with an express decision by Congress, in exercising the sovereign powers of the *national* government, to confer federal jurisdiction over individual causes of action against the states. *Parden* v. *Terminal R. Co.,* 377 U.S. 184 (1963); *Employees* v. *Department of Public Health,* 411 U.S. 279 (1973).

Parden and *Employees* involved the Commerce Clause. That clause does not authorize Congress to regulate states *per se,* but only to regulate interstate commerce. Accordingly, this Court recognized that Congress could make the states susceptible to suits under the Commerce Clause only as the states voluntarily brought themselves within the ambit of the commerce power by engaging in interstate commerce. The instant case, by contrast, involves an exercise of congressional power pursuant to Section 5 of the Fourteenth Amendment. As that Amendment empowers Congress to regulate the states directly, there is no need here, as there was in the commerce cases, to find a *subsequent* waiver of immunity by the states' electing to bring themselves within the ambit of congressional power: the states are by definition within the ambit of Congress' power to enforce the

Fourteenth Amendment. Their sovereignty in this area was yielded up to the national government when the Amendment was adopted, and with it the sovereign's right to immunity from suit.

Of course, that the states have ceded Congress the *power* to confer federal jurisdiction over federal question claims against them does not mean that the federal courts automatically have jurisdiction to entertain such claims. The lower federal courts have only such jurisdiction as Congress opts to confer upon them. Congress, sensitive to the extraordinary cession of state sovereignty implicit in our federal scheme, has treaded warily in conferring jurisdiction over individual causes of action against states, and this Court has demanded clear evidence of Congressional intent before concluding that the states have been made suable.

Such evidence exists in the case of the 1972 Amendments to Title VII. Congress decided that employee actions against states should be available, in which employees could recover all appropriate relief, including backpay.

The foregoing analysis, although valid for Congress' exercise of *any* of its enumerated powers, gains additional strength in this case because the cause of action was created pursuant to the Fourteenth Amendment. Even if the Eleventh Amendment *had* withdrawn federal judicial power over all claims against states under the Constitution as it *then* existed, the Fourteenth Amendment, adopted 70 years later, mandated Congress to fashion remedial schemes "appropriate" to enforce the obligations which that Amendment imposed directly upon the states.

ARGUMENT

IN ESTABLISHING FEDERAL JURISDICTION OVER EMPLOYEE ACTIONS AGAINST STATES FOR COMPLETE RELIEF, INCLUDING BACKPAY, FOR VIOLATIONS OF TITLE VII, CONGRESS PROCEEDED IN FULL CONFORMITY WITH THE CONSTITUTION.

A. Congress Has Power To Confer Federal Jurisdiction over Individual "Federal Question" Suits Against States.

In 1907, Mr. Justice Holmes, writing for the Court, succinctly stated the source of the sovereign's immunity from suit. *Kawanakoa* v. *Polyblank,* 205 U.S. 349, 353 (1907):

> Some doubts have been expressed as to the source of the immunity of a sovereign power from suit without its own permission, but the answer has been public property since before the days of Hobbes. Leviathan, chap. 26, 2. A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no right as against the authority that makes the law on which the right depends.

In the instant case, the State of Connecticut asserts that it is immune from a suit which Congress has authorized. That assertion of immunity obviously does not fit traditional notions of sovereign immunity, for here the state is not "the authority that [made] the law on which the right depends." Congress made the law; it acted within its power in doing so; and the Constitution declares that Congress' decision is "the supreme law of the land; . . . anything in the constitution or laws of any state to the contrary notwithstanding." Art. VI, cl. 2.

Connecticut's lack of "sovereignty" with respect to the subject matter of this suit is an outgrowth of our federal system, which creates bifurcated sovereignties. While the states of course remain sovereign with respect to all matters not committed to the control of the national government, they are not and cannot be "sovereign" in those areas where the federal power is "supreme." By entering the Union, and accepting the Constitution, the states yielded up their sovereignty to this extent. "[E]very addition of power to the General Government involves a corresponding diminution of the governmental powers of the States. It is carved out of them." *Ex parte Virginia,* 100 U.S. 339, 346 (1880).

The decision below thus does not vindicate Connecticut's "sovereignty," but rather deprives the federal government of a portion of *its* sovereignty. What the court below has done, in the name of the Constitution, is to reverse the Supremacy Clause. It has hamstrung Congress in the choice of means for implementing powers which Congress indisputably possesses, and conditioned Congress' ability to utilize the means which it prefers—and prefers for good reasons[8]—upon the states' consenting to that use.

Of course, a constitution could be written which commanded such incongruous results. But as we show in this brief, nothing in *our* Constitution commands them.

1. Article III, as originally adopted, conferred federal judicial power over federal question claims against the states, and the Eleventh Amendment did not withdraw that power.

Article III, Section 2 of the Constitution—which defines the federal judicial power—differs in an important respect from all other provisions of the Constitution. The other provisions delineate clear lines between those matters which remain the states' domain, and those which are ceded up to the federal government. But Article III, Section 2, obliterates those lines to some extent; in addition to conferring federal judicial power over "federal" questions, it confers such power over "state law" questions where there is diversity of citizenship. And its literal language appears to authorize suits against states by non-citizens without exception,[9] thus wholly eradicating the states' immunity from suit in areas of "state law" where their sovereignty is retained.

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[8] Not only does Congress' allowance of employee suits lessen the sums which must be appropriated for the Attorney General, but it also reflects Congress' judgment that employee enforcement is critical to the accomplishment of Title VII's objectives. *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 415 (1975). See also *Alyeska Pipeline Co.* v. *Wilderness Society,* 421 U.S. 240, 263 (1975).

[9] Article III, Section 2 extends the judicial power to "controversies . . . between a State and citizens of another State . . . and between a State, and foreign states, citizens, or subjects."

It is thus not suprising that while the "federal question" portion of the Article excited no concern among the state legislatures during the ratification process, the "diversity" portion—particularly that relating to the suability of states —was a subject of great discussion. The concern was not merely a theoretical one about the nature of the states' retained sovereignty, but a very practical one as well.[10] The war of revolution had drained the resources of the colonies. In order to finance the war, the colonies had borrowed heavily. They entered the Union with debts they knew they could not meet. So long as they remained independent entities this was not a problem, for they retained the power to deny access to their courts to disappointed creditors. But the diversity jurisdiction in the proposed Constitution, they feared, would enable foreign creditors, and creditors from other states, to secure judicial awards compelling payment.

It was to quiet these fears that Alexander Hamilton, in Federalist No. 81, "digress[ed]" to discuss "a supposition which has excited some alarm upon very mistaken grounds":

> It has been suggested that an assignment of the public securities of one State to the citizens of another, would enable them to prosecute that State in the federal courts for the amount of those securities; a suggestion which the following considerations prove to be without foundation.
>
> It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union. Unless, therefore, there is a surrender of this immunity in the plan of the

[10] This concern is described in *Cohens* v. *Virginia*, 19 U.S. 264, 406-407 (1821); *Petty* v. *Tennessee-Missouri Bridge Comm'n.*, 359 U.S. 275, 276, n. 1 (1959).

> convention, it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty were discussed in considering the article of taxation, and need not be repeated here. A recurrence to the principles there established will satisfy us, that there is no color to pretend that the State governments would, by the adoption of that plan, be divested of the privilege of paying their own debts in their own way, free from every constraint but that which flows from the obligations of good faith. The contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretensions to a compulsive force. They confer no right of action, independent of the sovereign will.
>
> To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced? It is evident, it could not be done without waging war against the contracting State; and to ascribe to the federal courts, by mere implication, and in destruction of a pre-existing right of the State governments, a power which would involve such a consequence, would be altogether forced and unwarrantable.[11]

As is apparent, Hamilton was *not* saying that the states could *never* be sued in the federal courts. He was saying that immunity from suit was "in the nature of sovereignty," and thus except as to those matters upon which the Constitution "produce[d] an alienation of State sovereignty" the states remained immune. Because the Constitution did not take from the states "the privilege of paying their own debts in their own way," they retained their sovereignty on this

[11] Federalist No. 81 (Hamilton), in *The Federalist* (Modern Library Ed.), pp. 529-530 (emphasis in original).

matter, and the fear that they could be sued in federal court to compel payment of their debts was unwarranted.

In the text quoted above, Hamilton indicated that the "circumstances which are necessary to produce an alienation of State sovereignty"—and which, implicitly, would withdraw the states' immunity from suit—had been "discussed in considering the article of taxation." The reference was to Federalist No. 32, where he had said:

> But as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States. This exclusive delegation, or rather this alienation, of State sovereignty, would only exist in three cases: where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one instance an authority to the Union, and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*. (*Id.* at 194; emphasis in original)

Hamilton's promise that the states could not be sued on their debts proved short-lived. In *Chisholm* v. *Georgia*, 2 U.S. 419 (1793), four of the Court's five justices declared that a state law assumpsit action by a creditor seeking to compel the state's payment of a debt was indeed within the federal jurisdiction, a holding which they premised upon the literal language of the diversity clause. Justice Iredell dissented, and his dissent is important to an understanding of what the Eleventh Amendment was later adopted to accomplish.

Justice Iredell fully recognized that Congress could make the states amenable to suits in federal court on federal question claims, a power which he deemed relevant "to the

execution of the other authorities of the general government (which it must be admitted are full and discretionary, within the restrictions of the constitution itself)," *id.* at 432. These "special objects of authority of the general government, wherein the separate sovereignties of the states are blended in one common mass of supremacy," *id.* at 435, were not the cause of his concern. As to them, he observed only that he believed an act of Congress was necessary to confer jurisdiction to entertain such suits, a course which he did not understand Congress to have yet taken, *id.* at 448-449.

Rather, Justice Iredell's concern was with the intrusion upon state sovereignty which the majority drew from the "peculiar" feature of Article III, Section 2: that after conferring federal question jurisdiction it "also goes further" and confers diversity jurisdiction as well, *id.* at 435-436. In his view, analysis of the extent to which states were suable under the *diversity* jurisdiction had to begin with an understanding of the respective sovereignties of the national and state governments, *id.* at 435:

> Every state in the union in every instance where its sovereignty has not been delegated to the United States, I consider to be completely sovereign, as the United States are in respect to the powers surrendered. The United States are sovereign as to all the powers of government actually surrendered. Each state in the union is sovereign as to all the powers reserved. It must be so, because the United States have no claim to any authority but such as the states have surrendered to them. Of course, the part not surrendered must remain as it did before.

But here was the rub: if under the diversity jurisdiction a state could be sued in federal court on state law grounds, it would lose the sovereign's immunity from suit in those very areas where the Constitution left the states sovereign.

Could this have been the framers' intention? Justice Iredell thought not. He believed that the diversity clause made the states suable only where, under the common law, the sovereign could be sued (i.e., by its consent) (*id.* at 436-446). By this construction, Justice Iredell believed that the language of the diversity clause could be given effect without abrogating the states' retained sovereignty.

The majority's holding in *Chisholm* sent shock tremors through the state legislatures. The Eleventh Amendment was proposed by an overwhelming vote at the next session of Congress, and was ratified by the states with "vehement speed."[12] Its wording is the strongest evidence that its purpose was narrow: to reinstate the framers' original intent with respect to the *diversity* clause (i.e., to maintain the states' immunity with respect to matters within their retained sovereignty), and *not* to withdraw federal judicial power over *federal* claims against states:

> The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

This language, of course, tracks the diversity clause of Article III, Section 2, and it defines the metes and bounds of the alteration which its authors sought to accomplish. The failure to prohibit *all* suits against states cannot be deemed an oversight. Its authors surely knew that both Hamilton and Justice Iredell had recognized the availability of federal question suits against states, and there is no evidence that the Amendment was intended to make the states immune from suit where they were not sovereign. Had its authors indeed had such an intention, it is difficult to believe that they would have chosen words so ill-suited to the task.

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[12] *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 708 (1949) (dissenting opinion of Mr. Justice Frankfurter).

That the purpose of the Eleventh Amendment was confined to the diversity clause was soon confirmed by Chief Justice Marshall. In *Cohens* v. *Virginia,* 19 U.S. 264, 380-383 (1821), he described the original intention of the drafters of Article III, Section 2, an intention which he did not find overturned by the Eleventh Amendment:

> "The counsel for the [state] . . . have laid down the general proposition, that a sovereign independent state is not suable except by its own consent.
>
> This general proposition will not be controverted. But its consent is not requisite in each particular case. It may be given in a general law. And if a state has surrendered any portion of its sovereignty, the question whether a liability to suit be a part of this portion, depends on the instrument by which the surrender is made. If, upon a just construction of that instrument, it shall appear that the state has submitted to be sued, then it has parted with this sovereign right of judging in every case on the justice of its own pretensions, and has entrusted that power to a tribunal in whose impartiality it confides.
>
> The American States, as well as the American people, have believed a close and firm Union to be essential to their liberty and to their happiness. They have been taught by experience, that this Union cannot exist without a government for the whole; and they have been taught by the same experience that this government would be a mere shadow, that must disappoint all their hopes, unless invested with large portions of that sovereignty which belongs to independent states. Under the influence of this opinion, and thus instructed by experience, the American people, in the conventions of their respective states, adopted the present constitution.
>
> If it could be doubted, whether from its nature, it were not supreme in all cases where it is empowered to

act, that doubt would be removed by the declaration, that "this constitution, and the laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby; anything in the constitution or laws of any state to the contrary notwithstanding."

This is the authoritative language of the American people; and, if gentlemen please, of the American States. It marks, with lines too strong to be mistaken, the characteristic distinction between the government of the Union and those of the states. The general government, though limited as to its objects, is supreme with respect to those objects. This principle is a part of the constitution; and if there be any who deny its necessity, none can deny its authority.

To this supreme government ample powers are confided; and if it were possible to doubt the great purposes for which they were so confided, the people of the United States have declared, that they are given "in order to form a more perfect union, establish justice, ensure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to themselves and their posterity."

With the ample powers confided to this supreme government, for these interesting purposes, are connected many express and important limitations on the sovereignty of the states, which are made for the same purposes. The powers of the Union, on the great subjects of war, peace, and commerce, and on many others, are in themselves limitations of the sovereignty of the states; but in addition to these the sovereignty of the states is surrendered in many instances where the sur-

render can only operate to the benefit of the people, and where, perhaps, no other power is conferred on Congress than a conservative power to maintain the principles established in the constitution. The maintenance of these principles in their purity, is certainly among the great duties of the government. One of the instruments by which this duty may be peaceably performed, is the judicial department. It is authorized to decide all cases of every description, arising under the constitution or laws of the United States. From this general grant of jurisdiction, no exception is made of those cases in which a state may be a party. When we consider the situation of the government of the Union and of a state, in relation to each other; the nature of our Constitution; the subordination of the state governments to that constitution; the great purpose for which jurisdiction over all cases arising under the constitution and laws of the United States is confided to the judicial department, are we at liberty to insert in this general grant, an exception of those cases in which a state may be a party? Will the spirit of the constitution justify this attempt to control its words? We think it will not. We think a case arising under the constitution or laws of the United States, is cognizable in the courts of the Union, whoever may be the parties to that case.

See also, *id.* at 412.

2. *Whatever the correctness of the decision in Hans* v. *Louisiana, its broad declaration that Congress lacks power to confer federal jurisdiction over federal question suits against states is unfaithful to the historical and judicial precedents.*

Congress first conferred general federal question jurisdiction upon the lower federal courts in 1875.[18] It was inevitable that cases would soon come to the Court involving federal claims against states. What was not inevitable—indeed,

[18] *Powell* v. *McCormack,* 395 U.S. 486, 515-516 (1969).

what was an extraordinary coincidence—was that the first cases to arrive would look so much like *Chisholm*.

Hans v. *Louisiana*, 134 U.S. 1 (1890), and its companion case, *North Carolina* v. *Temple*, 134 U.S. 22 (1890), were (like *Chisholm*) suits to compel states to honor their debt obligations. But, unlike *Chisholm*, they were federal question suits, the creditors contending that the states had impaired the obligation of their contracts by legislating exemption from their debts. The similarity to *Chisholm* clearly impressed the *Hans* Court, which repeatedly referred to the historical evidence that resistance to the enforceability of state debts was the immediate objective of the Eleventh Amendment, 134 U.S. at 12-13, 16.[14]

The Court recognized that the Eleventh Amendment could not preclude the suit, for the creditor was a citizen of Louisiana, *id*. at 10:

> In the present case the plaintiff in error contends that he, being a citizen of Louisiana, is not embarrassed by the obstacle of the 11th Amendment, inasmuch as that Amendment only prohibits suits against a State which are brought by the citizens of another State, or by citizens or subjects of a foreign state. *It is true, the Amendment does so read; and if there were no other reason or ground for abating his suit, it might be maintainable*. . . . (emphasis added).

But the Court found two "other reasons." One, which would have been entirely sufficient to dispose of the case, was that Congress had not conferred jurisdiction upon the

[14] It was not until a decade after adoption of the Eleventh Amendment that the Court ruled that the impairment of obligation of contract clause "extends to contracts to which a state is a party, as well as to contracts between individuals." *Fletcher* v. *Peck*, 10 U.S. 87 (1810), as characterized in *New Jersey* v. *Wilson*, 11 U.S. 164, 166 (1812). Thus, the authors of the Eleventh Amendment probably did not anticipate that state debts might still be reachable under the federal question clause of Article III.

lower federal courts to entertain the suit, *id*. at 18.[15] But the Court did not rest with that. It flatly declared that Congress was without power to create such a cause of action, for Article III, Section 2, as originally adopted did not include, within the federal judicial power, federal question claims against states, *id*., at 10-18.

This declaration proceeded from a misunderstanding of the relevant historical and judicial precedents. The Court quoted Hamilton's discussion in Federalist No. 81, and Justice Iredell's analysis in *Chisholm*, and drew from these the erroneous lesson that *all* suits against states were forbidden—a result which the *Hans* court presumed to have been intended by the framers of the original Constitution, frustrated by *Chisholm*, and restored in spirit by the Eleventh Amendment, *id*. at 13-14:

> The obnoxious clause to which Hamilton's argument was directed, and which was the ground of the objections which he so forcibly met, was that which declared that 'the judicial power shall extend to all . . . controversies between a State and citizens of another State, . . . and between a State and foreign states, citizens or subjects.' It was argued by the opponents of the Constitution that this clause would authorize jurisdiction to be given to the Federal courts to entertain suits against a State brought by citizens of another State, or of a foreign state. Adhering to the mere letter, it might be so; and so, in fact, the supreme court held in *Chisholm* v. *Georgia; but looking at the subject as Hamilton did, and as Mr. Justice Iredell did, in the light of history and experience and the established order of things,*

[15] The Court reasoned that as the statute conferring federal question jurisdiction invested the federal courts with jurisdiction "concurrent with the courts of the several States," and as the "state courts have no power to entertain suits by individuals against a State without its consent," Congress had not intended to confer jurisdiction over actions against states, *id*. at 18.

> *the views of the latter were clearly right—as the people of the United States in their sovereign capacity subsequently decided* (emphasis added).

This passage, on its face, discloses the slip in the Court's analysis. The Court recognized that the "obnoxious clause" was the diversity clause, that it was *this* clause which *Chisholm* had misconstrued by adherence to the "mere letter," and that the Eleventh Amendment was adopted to reverse *Chisholm*. Yet from these correct premises the Court drew the *non-sequitur* that that Amendment narrowed the scope of the federal question clause as well.

The Court appears to have overlooked entirely that both Hamilton and Justice Iredell recognized and approved the suability of states on federal question grounds. The Court did *not* overlook, however, that Chief Justice Marshall had said the same in *Cohens*. The latter observation was "conceded" to support the plaintiff in *Hans*, but "the observation was unnecessary to the decision, and in that sense *extrajudicial*, and, though made by one who seldom used words without due reflection, ought not to outweigh the important considerations referred to which lead to a different conclusion," *id.* at 20.

In sum, the *Hans* court construed the Constitution to preclude federal question claims against the states only by misreading the relevant historical and judicial sources, and by expressly disagreeing with Chief Justice Marshall's more contemporaneous reading of the framers' intent. Moreover, the *Hans* opinion, which contains extensive passages about state sovereignty, takes no account of the fact that on federal questions, where the states have ceded power to the "supreme" federal government, the states are *not* sovereign. Considering the weakness of *Hans*' foundations, it is not surprising that *Hans*' broad declaration collapsed upon first impact with a federal question suit against a state brought pursuant to a congressional conferral of jurisdiction to entertain such suits.

3. *This Court has recognized the inapplicability of Hans where Congress has expressly conferred jurisdiction to entertain federal question suits against states.*

It was not until 1963 that the collision came. *Parden* v. *Terminal R. Co.*, 377 U.S. 184 (1963), was a suit brought under the Federal Employers' Liability Act, a statute giving railroad employees a federal cause of action for damages suffered in the course of their employment. Following the passage of the FELA, the State of Alabama acquired ownership of a small railroad. An employee of that railroad, injured in the course of his employment, brought suit for damages under the FELA. The State of Alabama asserted that the railroad was "an agency of the State and the State had not waived its sovereign immunity from suit." 377 U.S. at 185.

The Court noted the legal issues, and their novelty, in these words (*id.* at 187):

> Here, for the first time in this Court a State's claim of immunity against suit by an individual meets a suit brought upon a cause of action expressly created by Congress. Two questions are thus presented: (1) Did Congress in enacting the FELA intend to subject a state to suit in these circumstances? (2) Did it have the power to do so, as against the state's claim of immunity?

Answering the first question, the Court concluded that Congress in enacting the FELA intended its provisions to be applicable to all railroads, "whether they are state owned or privately owned." (*id.* at 188).

The Court then turned to the second issue: whether Congress has power, consistent with the Eleventh Amendment, to create a federal cause of action for damages against a state. The Court began by rejecting *Hans* as controlling authority, explaining that, however broadly worded the *Hans* opinion, it must be understood in the context in which

it arose: "Such a suit on state debt obligations without the State's consent was precisely the 'evil' against which both the Eleventh Amendment and the expanded immunity of the *Hans* case were directed," 377 U.S. at 187. The Court found the suit before it "distinctly unlike *Hans*," *id.* at 186, and declared that the Eleventh Amendment could not stand as a barrier to Congress' creating causes of action to implement the powers which the states had yielded up in adopting the Constitution:

> Respondents contend that Congress is without power, in view of the immunity doctrine, thus to subject a state to suit. We disagree. Congress enacted the FELA in the exercise of its constitutional power to regulate interstate commerce. While a state's immunity from suit by a citizen without its consent has been said to be rooted in 'the inherent nature of sovereignty' . . ., the states surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce. . . . By empowering Congress to regulate commerce, then, the states necessarily surrendered any portion of their sovereignty that would stand in the way of such regulation. Since imposition of the FELA right of action upon interstate railroads is within the congressional regulatory power, it must follow that application of the Act to such a railroad cannot be precluded by sovereign immunity. (*Id.* at pp. 190-192).

As the *Parden* court recognized, the extent to which the Commerce Clause results in a lifting of state sovereignty depends upon the extent to which Congress chooses to exercise its power, granted by that clause, to regulate interstate commerce. A state, pursuant to powers otherwise reserved to it, may regulate its internal commerce, or participate in interstate commerce, where such activities do not conflict with an exercise of the commerce power given to Congress. But, where such a conflict exists, "the act of

Congress . . . is supreme; and the law of the state, though enacted in the exercise of powers not controverted, must yield to it." *Gibbons* v. *Ogden,* 22 U.S. 1, 211 (1824). Thus, this Court in *Parden* concluded that Congress may in the proper exercise of its power to regulate commerce subject the states to suit where they run afoul of that regulation without infringing upon their sovereignty. The corollary to this proposition is, as the Court recognized, that a state may avoid subjecting itself to such suits by refraining from participation in the sphere where Congress has exercised its supreme power, 377 U.S. at 196:

> [W]hen a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation.

Accordingly, on the facts of *Parden,* the Court concluded, *id.* at 192:

> Our conclusion is simply that Alabama, when it began operation of an interstate railroad approximately 20 years after enactment of the FELA, necessarily consented to such suit as was authorized by that Act. By adopting and ratifying the Commerce Clause, the States empowered Congress to create such a right of action against interstate railroads; by enacting the FELA in the exercise of this power, Congress conditioned the rights to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus to have consented to suit.

On the proposition critical here, the Court was unanimous, for the dissenters in *Parden* agreed "that it is within the power of Congress to condition a State's permit to en-

gage in the interstate transportation business on a waiver of the State's sovereign immunity from suits arising out of such business." *Id.* at 198. The disagreement of the dissenters was with the Court's conclusion that Congress in enacting the Federal Employers' Liability Act had intended to subject states so engaged to such suits.

That Congress may pursuant to its commerce power subject states to suits in federal courts was again the foundation of this Court's analysis in *Employees* v. *Department of Public Health,* 411 U.S. 279 (1973). The Court dealt there with the 1966 amendments to the Fair Labor Standards Act, by which Congress made the substantive provisions of the FLSA applicable to state hospital and educational employees. The Court had already upheld the constitutionality of the substantive coverage, *Maryland* v. *Wirtz,* 392 U.S. 183 (1968), but had reserved the question whether individuals could sue to recover unpaid wages, *id.* at 199-200.

In *Employees,* the Court stated the issue as "whether Congress has brought the States to heel, in the sense of lifting their immunity from suit in a federal court." 411 U.S. at 283. The Court concluded "that Congress did not lift the sovereignty immunity of the States under the FLSA," *id.* at 285, because "we have found not a word in the history of the 1966 amendments to indicate a purpose of Congress to make it possible for a citizen of that state or another state to sue the state in the federal courts," and it "would be . . . surprising . . . to infer that Congress deprived Missouri of her constitutional immunity without . . . indicating in some way by clear language that the constitutional immunity was swept away," *ibid.*[18]

[18] This was also the conclusion in *Edelman* v. *Jordan,* 415 U.S. 651 (1974), an action under 42 U.S.C. §1983, the Court finding that "the threshold fact of congressional authorization to sue a class of defendants which literally include States is wholly absent," *id.* at 672.

But the Court recognized in *Employees* that Congress has *power* to lift the states' immunity, *id.* at 286-287:

> The Solicitor General, as *amicus curiae,* argues that *Hans* v. *Louisiana,* 134 U.S. 1, should not be construed to apply to the present cause, his theory being that in *Hans* the suit was one to collect on coupons attaching to state bonds, while in the instant case the suit is a cause of action created by Congress and contained in §16(b) of the Act. It is true that, as the Court said in *Parden,* 'the states surrendered a portion of their sovereignty when they granted Congress the power to regulate commerce'. 377 U.S., at 191. But we decline to extend *Parden* to cover every exercise by Congress of its commerce power, *where the purpose of Congress to give force to the Supremacy Clause by lifting the sovereignty of the states and putting the states on the same footing as other employers is not clear* (emphasis added).

We show in the next section that here the congressional purpose to put the states "on the same footing as other employers" is unmistakable. Thus, while the states are in general "sovereign" in their dealings with their own employees, here Congress has "lifted their sovereignty" to the extent that Title VII imposes obligations which must be met, and, as part of that "lifting", has made the states suable by aggrieved employees for violations of those obligations. Before turning to the evidence of that congressional decision, however, it is important to note a significant difference in the analysis required here from that in *Parden* and *Employees.* The source of the congressional power here is the Fourteenth Amendment. Whereas the Commerce Clause does not authorize Congress to regulate states *per se,* but only to regulate interstate commerce, the Fourteenth Amendment *does* authorize Congress to regulate the states directly. Only as a state might elect to engage in interstate commerce would it come within the ambit of the congressional power to create private "commerce" causes of action against it. But the

Fourteenth Amendment is different, for the states brought themselves within its ambit, "consented" to Congress' creating a private cause of action against them pursuant to that Amendment, when the Amendment was added to the Constitution. As the Court explained in *Ex Parte Virginia,* 100 U.S. at 346:

> "The prohibitions of the 14th Amendment are directed to the States, and they are to a degree restrictions of state power. It is these which Congress is empowered to enforce, and to enforce against state action, however put forth, whether that action be executive, legislative or judicial. Such enforcement is no invasion of state sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact."

It is thus not necessary here, as it was in *Parden,* to find a *subsequent* waiver of immunity by the states' electing to bring themselves within the ambit of congressional power. The states are by definition within the sphere of Congress' power to enforce the Fourteenth Amendment.

B. Congress Clearly Decided to Confer Federal Jurisdiction Over Employee Actions Against States for Complete Relief, Including Backpay, for Violations of Title VII.

Of course, that the states have ceded to Congress the *power* to create private causes of action against them does not mean that the federal courts may take jurisdiction of all "federal question" actions against states. The lower federal courts have only such jurisdiction as Congress opts to confer upon them. Congress, sensitive to the extraordinary cession of state sovereignty implicit in our federal scheme, has treaded warily in conferring federal court jurisdiction over private actions against states. See, e.g., *Monroe* v. *Pape,* 365 U.S. 187-192 (1961); *Edelman* v. *Jordan,* 415 U.S. 651, 675-677 (1974). This Court accordingly has demanded clear evidence of a congressional decision to authorize private suits against states before concluding that Congress

has made the fateful judgment to "lift" the states' immunity. *Employees, supra,* 411 U.S. at 285-286; *Edelman, supra,* 415 U.S. at 674-677. See also *Parden, supra,* 377 U.S. at 198-199 (dissenting opinion).

Such clear evidence exists in the case of the 1972 amendments to Title VII. Congress not only amended the definition of "employer" to add states and local governments, but also amended the enforcement provisions, expressly making governmental employers suable by the Attorney General or, if he does not act within 180 days of the filing of a charge, by aggrieved employees.[19] In a section-by-section analysis of the bill, the floor managers in the Senate (Senators Williams and Javits) explained that the conferees had not stopped with empowering the Attorney General to sue, but had also allowed "the person aggrieved to elect to pursue his or her own remedy under this title in the courts where there is agency inaction, dalliance or dismissal of the charge, or unsatisfactory resolution," because "the individual's rights to redress are paramount under the provisions of Title VII" and thus "it is necessary that all avenues be left open for quick and effective relief."[20]

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[19] As the Conference Report explained (S. Rep. No. 92-681, 92d Cong. 2d Sess. 17-18 (1972); H. Rep. No. 92-899, 92d Cong. 2d Sess. 17-18 (1972)):

> The conferees adopted a provision allowing the [Equal Employment Opportunity] Commission, or the Attorney General in a case against a state or local government agency, to bring an action in Federal district courts if the Commission is unable to secure from the respondent 'a conciliation agreement acceptable to the Commission.' Aggrieved parties are permitted to intervene. They may bring a private action if the Commission or Attorney General has not brought suit within 180 days or the Commission has entered into a conciliation agreement to which such aggrieved party is not a signatory. The Commission, or the Attorney General in a case involving state and local governments, may intervene in such private action.

[20] Section-By-Section Analysis of H.R. 1746, reprinted in *Legislative History of the Equal Employment Opportunity Act* of 1972, published by the Senate Committee on Labor and Public Welfare, p. 1847.

The evidence of Congressional intent here is, of course, markedly different from that found insufficient in *Employees*. Although Congress in the 1966 amendments to FLSA had amended the definition of "employer" to include state governments, it had not changed the enforcement provisions of the statute. The Court, noting that there was "not a word in the history of the 1966 amendments to indicate a purpose of Congress" to permit private actions against states, was unwilling to infer that Congress had "silently" lifted the states' immunity from suit. 411 U.S. at 285. Here, by contrast, the evidence of congressional intent to permit private actions is explicit. Furthermore, this Court relied in *Employees* upon two additional considerations not present here: (1) that "private enforcement of the Act was not a paramount objective," *id.* at 286[21]; and (2) that private actions under the FLSA could yield twice the recovery of suits by the Secretary of Labor: "it is one thing, as in *Parden,* to make a state employee whole; it is quite another to let him recover double against a state . . . . [W]e are reluctant to believe that Congress in pursuit of a harmonious federalism desired to treat the States so harshly," *id.* at 286.[22]

Similarly, this case is altogether different from *Edelman* v. *Jordan* (*supra,* n. 18), where the Court found "wholly absent" the "threshold fact of congressional authorization to

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[21] In contrast, Congress created under Title VII a private cause of action precisely because the private rights were deemed "paramount," Leg. Hist. 1847.

[22] Under Title VII, by contrast, the remedies are the same whether suit is brought by the Attorney General or by aggrieved employees, except that the latter may recover attorneys fees. Whether attorneys fees are even a concern of the Eleventh Amendment is a question on which a conflict of circuits exist (the court below holding that they are not) and is the subject of the cross-petition in this case, No. 75-283. We intend to file an *amici curiae* brief in No. 75-283, arguing that awards of attorneys fees are never precluded by the Eleventh Amendment. Rather than incorporating that argument into the instant brief, we have opted to await the filing of the cross-petitioner's brief, so that our discussion can be responsive to the cross-petitioner's contentions.

sue a class of defendants which literally includes States," 415 U.S. at 672.

In sum, the Eleventh Amendment imposes no barrier to private actions for backpay where, as here, (1) Congress has acted within its enumerated powers in imposing a *substantive* obligation, (2) Congress has unmistakably created a private cause of action in the federal courts to recover remedies from the states for violating that obligation, and (3) the states are within the ambit of the congressional regulatory power (either directly, as under the Fourteenth Amendment, or by voluntarily bringing themselves within it, as in the commerce cases).

C. The Foregoing Analysis Gains Additional Strength in This Case Because the Cause of Action Was Created Pursuant to the Fourteenth Amendment.

If we are right that Congress is empowered to create a private cause of action against states in effectuation of *any* of Congress' enumerated powers, there is no need to examine the special considerations which arise from the fact that the Fourteenth Amendment was adopted after the Eleventh, and that the cause of action involved here was created by Congress in the exercise of the authority conferred upon it by Section 5 of the Fourteenth Amendment. But these special considerations would compel the conclusion that the Eleventh Amendment is inapplicable here, even if the Court disagreed with our broader contention.

1. *The question whether the later enactment of the Fourteenth Amendment brings it outside the scope of the Eleventh has been recognized, but not decided, in prior cases.*

The question whether the Eleventh Amendment is applicable to suits for vindication of the Fourteenth was first presented in *Ex Parte Young,* 209 U.S. 123 (1908). The Court noted the question, but expressly refrained from deciding it (*Id.* at 150):

> "We think that, whatever the rights of complainants may be, they are largely founded upon that [the Four-

teenth] Amendment, but a decision in this case does not require an examination or decision of the question whether its adoption in any way altered or limited the effect of the earlier [Eleventh] Amendment."

Instead, the Court accorded complainants the relief they sought by holding the Eleventh Amendment inapplicable to suits for injunctive relief against state officers.

Remarkably, neither this Court nor any lower court had occasion to discuss the question which *Ex parte Young* left open until *Edelman* v. *Jordan,* 415 U.S. 651 (1974). In *Edelman,* Mr. Justice Marshall observed, in dissent, *id.* at 694, n. 2:

> "It should be noted that there has been no determination in this case that state action is unconstitutional under the Fourteenth Amendment. Thus, the Court necessarily does not decide whether the States' Eleventh Amendment sovereign immunity may have been limited by the later enactment of the Fourteenth Amendment to the extent that such a limitation is necessary to effectuate the purposes of that Amendment, an argument advanced by an amicus in this case."

However, some lower courts, including the court below (519 F.2d at 571), have construed the Court's opinion in *Edelman* as indeed determining the issue.[23] They point to the Court's disapproval[24] of three prior decisions[25] in which

[23] *Jordan* v. *Gilligan,* 500 F.2d 701, 709 (6th Cir. 1974); *Skehan* v. *Board of Trustees of Bloomsburg State Col.,* 501 F.2d 31, 42-43, n. 7 (3rd Cir. 1974).

[24] 415 U.S. at 670-671, and n. 13 thereat.

[25] *Shapiro* v. *Thompson,* 394 U.S. 618 (1969), affirming 270 F. Supp. 331, 338, n. 5 (D. Conn. 1967); *State Depart. of Health and Rehabilitation Services* v. *Zarate,* 407 U.S. 918 (1972), affirming 347 F. Supp. 1004 (S.D. Fla. 1971); *Wyman* v. *Bowens,* 397 U.S. 49 (1970), affirming, 304 F. Supp. 717 (S.D. N.Y. 1969) (order at CCH Poverty Law Rep. ¶10,506 [1968-1971 Transfer Binder]).

the Court had, without discussion of the sovereign immunity question, affirmed monetary awards against states for violating the Fourteenth Amendment. But the cases disapproved, although involving substantive violations of the Fourteenth Amendment, did not arise under a statute wherein Congress had conferred jurisdiction over actions for monetary relief against the states. On the contrary, each arose under 42 U.S.C. §1983, a statute which does not authorize suits against the states themselves.[26] The Court in *Edelman* declared the *Parden* analysis inapplicable to §1983 actions precisely because "the threshold fact of congressional authorization to sue a class of defendants which literally includes States is wholly absent." 415 U.S. at 672; see also *id.* at 675-677.

2. The later enactment of the Fourteenth Amendment would, indeed, bring it outside the reach of the Eleventh, even if the Eleventh otherwise precluded federal question actions against states.

This case is thus the first to present squarely the issue left open in *Ex parte Young* as to the relationship between the Eleventh and Fourteenth Amendments. Here, Congress decided that a private cause of action against the states should be created to implement the Fourteenth Amendment. Even if the Eleventh Amendment deprives Congress of the power to authorize such causes of action to effectuate those provisions of the Constitution which antedated that Amendment, that Amendment cannot restrict Congress' power to

[26] *Cheramie* v. *Tucker,* 493 F.2d 586, 587-588 (5th Cir. 1974); *Meyer* v. *State of New York,* 344 F. Supp. 1377, 1379 (S.D. N.Y. 1971), affirmed, 463 F.2d 424 (2nd Cir. 1972); *Dean Hill Country Club, Inc.* v. *City of Knoxville,* 379 F.2d 321, 324 (6th Cir. 1967), cert. denied, 389 U.S. 975 (1967); *United States ex rel. Lee* v. *State of Illinois,* 343 F.2d 120 (7th Cir. 1965); *Sires* v. *Cole,* 320 F.2d 877, 879 (9th Cir. 1963). See also *Monroe* v. *Pape,* 365 U.S. 187-192 (1961); *City of Kenosha* v. *Bruno,* 412 U.S. 507, 511-513 (1973); *Edelman* v. *Jordan, supra,* 415 U.S. at 676-677.

create private causes of action against states to implement the later-enacted Fourteenth Amendment, as we now show.

"The true spirit and meaning of the [Reconstruction] Amendments . . . cannot be understood without keeping in view the history of the times when they were adopted. . . ." *Strauder* v. *West Virginia,* 100 U.S. 303, 306 (1880). The nation had just emerged from a civil war, and several states were under military occupation. The "statesmen who had conducted the Federal government in safety through the crisis of the Rebellion . . . passed through Congress the proposition for the 14th Amendment, and they declined to treat as restored to their full participation in the government of the Union the states which had been in insurrection, until they ratified that article by a formal vote of their legislative bodies." *Slaughter-House Cases,* 83 U.S. 36, 70-71 (1873).

The Fourteenth Amendment was addressed specifically to the states, and placed limitations upon their freedom to act. Section 1 declared that "no State shall" engage in enumerated acts. Section 5 invested Congress with "power to enforce, by appropriate legislation, the provisions of this article." The Amendment reflected a national judgment that states could be wrongdoers, and that the state courts could not be relied upon to right such wrongs.[27]

In the *Civil Rights Cases,* 109 U.S. 3, 17-18 (1883), the Court described the authority conferred upon Congress by this Amendment:

> This abrogation and denial of rights, *for which the States alone were or could be responsible,* was the great seminal and fundamental wrong which was intended to be remedied. *And the remedy to be provided must necessarily be predicated upon that wrong . . .*

[27] See generally, Flack, *The Adoption of the Fourteenth Amendment* (Johns Hopkins Press, 1907; Peter Smith, 1965).

> . . . [A]ny legislation by Congress in the matter must necessarily be corrective in its character, adapted to counteract *and redress* the operation of such prohibited state laws or proceedings of state officers (emphasis added).

In *Ex parte Virginia,* 100 U.S. 339, 347-348 (1880), the Court recognized the breadth of the remedial power conferred upon Congress by Section 5 of the Amendment:

> Were it not for the 5th section of that Amendment, there might be room for argument that the 1st section is only declaratory of the moral duty of the State . . . But the Constitution now expressly gives authority for *congressional interference and compulsion* in the cases embraced within the 14th Amendment. It is but a limited authority, true, extending only to a single class of cases; *but within its limits it is complete* (emphasis added).

Similiarly, in *Virginia* v. *Rives,* 100 U.S. 313, 318 (1880), the Court observed:

> Congress, by virtue of the 5th section of the 14th Amendment, may enforce the prohibitions whenever they are disregarded by either the Legislative, the Executive or the Judicial Department of the State. *The mode of enforcement is left to its discretion* (emphasis added).

The Court recognized that Section 5 of the Amendment transferred from the states to Congress a measure of the sovereignty which the states previously had enjoyed, *Ex parte Virginia, supra,* 100 U.S. at 345:

> [The Reconstruction Amendments] were intended to be, what they really are, limitations on the power of the States and enlargements of the power of Congress. . . . [T]his protection and this guaranty, as the 5th section of the Amendment expressly ordains, may be enforced by Congress by means of appropriate legislation.

This Court has long recognized that monetary relief in private causes of action may be essential to cure violations of the Fourteenth Amendment, see, e.g., *Sullivan* v. *Little Hunting Park,* 396 U.S. 229, 238-240 (1969), and it has specifically recognized that backpay is critical to the vindication of Title VII's objectives of ending employment discrimination and making whole the victims of such discrimination. *Albemarle Paper Co.* v. *Moody,* 422 U.S. 405, 417-421 (1975).

In light of the foregoing, it is apparent that the states may not invoke sovereign immunity to resist Congress' creation of private causes of action for comple relief, including back pay, for violations of the Fourteenth Amendment. If Congress' power to enforce the Amendment is to be "complete"; if the "State" is to be made responsible for actions which the Amendment forbids the "State" from performing; if recognition is to be given to the national judgment that federal remedies in federal courts were essential to vindicating the Amendment's objectives, then the conclusion is inevitable that, whatever limitations the Eleventh Amendment may impose upon Congress' power to create causes of action for *other* constitutional violations, those limitations are wholly inapplicable to the power conferred upon Congress by the later-enacted Fourteenth Amendment.

CONCLUSION

For the reasons set forth above, the decision below, insofar as it found the Eleventh Amendment a barrier to awarding monetary relief, should be reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-251

GARLAND M. FITZPATRICK, et al.,

Petitioners,

v.

FREDERICK BITZER, et al.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF ALAN RABINOVITCH AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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IN THE

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OCTOBER TERM, 1975

No. 75-251

GARLAND M. FITZPATRICK, et al.,
Petitioners,

v.

FREDERICK BITZER, et al.

BRIEF OF ALAN RABINOVITCH AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Interest of the Amicus

Alan Rabinovitch respectfully submits this brief as *amicus curiae* in support of petitioners. The consent of the attorneys for both petitioners and respondents to the filing of this brief has been obtained.[1]

Alan Rabinovitch is a Canadian citizen lawfully admitted to permanent residence in the United States. He is 21

[1] By letters dated January 13 and 14, 1976, respectively, Sidney D. Giber, Assistant Attorney General of Connecticut, and Austin Carey, Jr., attorney for petitioners, indicated that the parties hereto had "no objection" to the filing of an *amicus curiae* brief on behalf of Alan Rabinovitch. (Copies of the letters have been filed with the Clerk.)

years old and has lived in New York State and New York City since coming to the United States in 1964. He received the bulk of his primary and secondary school education in New York City public schools and is presently a junior enrolled in Brooklyn College, a part of the City University of New York. In January 1973 Mr. Rabinovitch took the New York State Regents Qualifying Examinations and was notified in April of that same year that his performance on the test had earned him an academic performance scholarship.[2] In addition, he was informed that tuition assistance program awards would also be available to him.[3] In May 1973 he was informed that in order to receive a Regents Scholarship and tuition assistance he would have to forthwith apply for American citizenship. He refused and in September 1973, was advised that the offer of a Regents Scholarship and tuition assistance had been withdrawn on the sole ground that, since he did not intend to become a citizen of the United States, then Section 602 (2)—since renumbered § 661(3)—of the New York Education Law[4] precluded his receipt of any form of financial assistance from New York State toward the cost of his higher education.

Mr. Rabinovitch brought suit in the United States District Court for the Eastern District of New York challenging the constitutionality of New York Education Law § 661(3) on the grounds that it violated both the Fourteenth

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[2] *See* New York Educat[illegible] Law §§ 605, 670 *et seq.* (McKinneys 1974).

[3] *See id.* §§ 604, 667 et seq.

[4] "Citizenship. An applicant (a) must be a citizen of the United States, or (b) must have made application to become a citizen, or (c) if not qualified for citizenship, must submit a statement affirming intent to apply for United States citizenship as soon as he has the qualifications, and must apply as soon as eligible for citizenship."

Amendment and the Supremacy Clause of the Constitution. *Rabinovitch* v. *Nyquist,* 74 Civ. 1142 (OGJ). He sought the convening of a three-judge district court, 28 U.S.C. §§ 2281 and 2284, which motion was granted.[5]

As a consequence of the enforcement of § 661(3) of the Education Law, Mr. Rabinovitch has been forced to attend a public college and has been deprived of any financial assistance toward the cost of his higher education. For the academic years 1973-74 and 1974-75, it is estimated that he has been deprived of between $500 and $2,000. At the close of the current academic year that amount will increase to between $750 and $3,000.

In addition to seeking declaratory and injunctive relief, Mr. Rabinovitch has prayed for a judgment against the New York State Higher Education Services Corporation ("NYSHESC")[6] equal to the amount of withheld scholarship and tuition assistance funds. He has argued alternatively that a judgment against NYSHESC would not constitute a judgment against New York State barred by the Eleventh Amendment or that the Eleventh Amendment does not bar federal courts from ordering the payment of withheld funds in an action brought under the Fourteenth Amendment and federal statutes to redress a deprivation of equal protection of the laws.

The case of *Rabinovitch* v. *Nyquist* was argued on joint motions for summary judgment in July 1975. A decision has not yet been rendered, and counsel has reason to be-

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[5] In Buffalo, New York, a French national enrolled in graduate studies in the State University brought a similar lawsuit challenging Education Law § 661(3). *Mauclet* v. *Nyquist,* Civ-75-73 (W.D.N.Y.). By order of Chief Judge Kaufman of the Second Circuit, a single three-judge court was convened to adjudicate both cases.

[6] *See* New York Education Law §§ 652-655, 657, 660, 680, 686 (McKinneys 1974).

lieve that the court's decision will be withheld pending this Court's opinion in *Fitzpatrick* v. *Bitzer*.

Mr. Rabinovitch's interest in the instant case is accordingly direct and vital. It is likely that the Court's decision herein will directly affect his claim for withheld scholarship and tuition assistance funds.[7] As such, he submits this brief setting forth the views of his counsel as to the questions of law presented by the instant case. In addition, this brief explicates, in summary fashion, the application of the controlling constitutional principles here at stake to the case of an alien seeking redress from a denial of equal protection.

Argument

1. In *Edelman* v. *Jordan*, 415 U.S. 651 (1974), the district court, after finding that Illinois had administered its programs of Aid to the Aged, Blind and Disabled in a manner inconsistent with federal law, awarded prospective injunctive relief and, in addition, ordered state officials to make back payments of the funds unlawfully withheld. That award was upheld in the court of appeals, but was reversed by a vote of 5-4 in this Court. In *Edelman* the Court dealt only with the question whether the award of retroactive benefits against Illinois to redress a violation of federal regulations under the Social Security Act

[7] It is assumed in this brief that Mr. Rabinovitch will prevail on the question of the unconstitutionality of Education Law § 661 (3). *See In re Griffiths*, 413 U.S. 717 (1973); *Sugarman* v. *Dougall*, 413 U.S. 634 (1973); *Graham* v. *Richardson*, 403 U.S. 365 (1971); *Takahashi* v. *Fish & Game Commission*, 334 U.S. 410 (1948); *Truax* v. *Raich*, 239 U.S. 33 (1915); *Miranda* v. *Nelson*, 351 F. Supp. 735 (D. Ariz. 1972) (three-judge court), *aff'd* 413 U.S. 902 (1973); *Chapman* v. *Gerard*, 456 F.2d 577 (3d Cir. 1972); *Jagnandan* v. *Giles*, 379 F. Supp. 1178 (N.D. Miss. 1974) (three-judge court); *Purdy & Fitzpatrick* v. *California*, 71 Cal. 2d 556, 79 Cal. Rptr. 77, 456 P.2d 645 (1969).

violated the Eleventh Amendment. While the question whether the Fourteenth Amendment limits the ban of the Eleventh in a case brought under the former's equal protection clause was raised by an *amicus* in that case, the Court quite properly did not reach that issue. *See* 415 U.S. at 694 n. 2 (Marshall, J., dissenting). As the Court had done before, see *Ex parte Young*, 209 U.S. 123, 150 (1908), it declined to decide whether the Fourteenth Amendment limited the effect of the Eleventh because as *Edelman* came to the Court it simply was not a Fourteenth Amendment case.

This case confronts the Court, for the first time, with the unavoidable question as to whether the award of monetary damages against a state is authorized by the Fourteenth Amendment for the purpose of granting complete relief to victims of a denial of equal protection suing under a federal statute passed pursuant to the authority vested in Congress by Section 5 of that Amendment. The decision in *Edelman* did not and could not speak to this issue because that case came before the Court in the context of a decision finding only that Illinois had violated federal regulations.

The Second Circuit based its contrary conclusion upon the surprising contention that in *Edelman* this Court "expressly overruled" earlier Fourteenth Amendment cases which granted retroactive monetary awards. *Fitzpatrick* v. *Bitzer*, 519 F.2d 559, 571 (2d Cir. 1975). To the same effect, *see Jordan* v. *Gilligan*, 500 F.2d 701, 709 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1975); *Skehan* v. *Board of Trustees of Bloomsberg State College*, 501 F.2d 31, 42-43 n. 7 (3d Cir. 1974), *vacated*, 421 U.S. 983 (1975). However, the Court in *Edelman* was careful not to overrule those cases; rather, the Court stated only that "we *disapprove* the Eleventh Amendment holdings of those cases *to the extent* [*if any*] *that they are inconsistent with our holding today*." 415 U.S. at 671. (Emphasis supplied.) It is

submitted that the Court did no more than urge caution when relying on such cases in the Eleventh Amendment context. It could do no more because in *Edelman* the Fourteenth Amendment issue was not at stake, and it was not decided.

2. Sovereign immunity is but a procedural incident to sovereignty itself. In the discussions of sovereign immunity leading to the embodiment of that immunity in the Eleventh Amendment, the question of whether and to what extent a state had sovereign immunity was considered to turn on whether and to what extent the state itself was sovereign. *See Chisholm* v. *Georgia,* 2 U.S. (2 Dall.) 419, 429 (1793) (Inedell, J., dissenting); *The Federalist,* Number 81 (Hamilton) (Dawson ed. 1863) p. 567. It was understood that state sovereignty could be lost by a substantive constitutional limitation on the powers of the states and that, in such a case, immunity would fail as well.

At the time this was a concession of no practical consequence. The Constitution as it existed prior to the Civil War contained few significant limitations on the sovereignty of the states in dealing with individual citziens. In the decade following the Civil War, however, this situation was deliberately and drastically altered by adoption of the Thirteenth, Fourteenth and Fifteenth Amendments, which expressly limited the powers of the states in their relations with private citizens. Those enactments, together with the statutes enforcing them, were conceived by Congress as clearly altering the relationship between the states and the nation, and working a "vast transformation" from the concepts of federalism that had prevailed in the late 18th century. *Mitchum v. Foster,* 407 U.S. 225, 242 (1972); *Zwickler* v. *Koota,* 389 U.S. 241, 245-46 (1967). As the legislative history of the Reconstruction Amendments demonstrates, those constitutional proclamations were understood to work a substantial restriction on the prior sovereignty and reserved rights of the states.

The Fourteenth Amendment created precisely the case in which immunity has no place, for it stripped the states of their pre-existing power to sanction denials of equal protection. In the areas proscribed by the Reconstruction Amendments the states no longer enjoy any sovereign power which can or should be protected by the Eleventh Amendment.

That any rights arising under the Reconstruction Amendments should be without a fully effective remedy is particularly inappropriate since those Amendments, especially the Fourteenth, were primarily remedial. The manifest desire of Congress, in framing the Reconstruction Amendments and subsequent legislation, was to exercise all its power to create fully effective remedies and to withdraw from the states any power to defeat or prevent enforcement of certain basic rights. Under these circumstances the existence of an Eleventh Amendment defense in litigation under the Fourteenth Amendment seeking monetary damages is entirely incompatible with the rights protected by the Amendment.

3. In deciding the specific issues involved in *Fitzpatrick* v. *Bitzer,* the Court should bear in mind the particular and different context presented by the *Rabinovitch* case.

A. Since federal power in the area of regulating the immigration and legal status of aliens is supreme and exclusive,[8] the states have been, from the moment of the ratification of the Constitution, wholly without sovereign power which could have been subject to protection via the

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[8] The power to regulate the immigration and naturalization of aliens is vested exclusively in the federal government. *Fong Yue Ting* v. *United States,* 149 U.S. 698, 713 (1893); *Truax* v. *Raich, supra,* 239 U.S. at 42; *Hines* v. *Davidowitz,* 312 U.S. 52, 62 (1941); *Takahashi* v. *Fish & Game Commission, supra,* 334 U.S. at 419; *Graham* v. *Richardson, supra,* 403 U.S. at 377-78; U.S. Const. Art. I, § 8, cl. 4. State laws which constitute an encroachment on that power cannot stand. *Id.*

Eleventh Amendment. The states clearly waived sovereignty as to the regulation of immigration by adopting the Constitution. While the Eleventh Amendment closed the federal courts to ordinary suits by aliens against states, upon the adoption of the Fourteenth Amendment and 42 U.S.C. §§ 1981 and 1983, the judicial power of the United States was revived as to claims by aliens against states growing out of state action denying equal protection and equal treatment under law with citizens. This conclusion follows from the fact that the states had no sovereign power to regulate the legal status of aliens after 1789, and the jurisdictional bar of the Eleventh Amendment to suits by an alien against a state was lifted by the Fourteenth Amendment in the particular area of its concern.

It would be particularly inappropriate, even ironic, for states to defeat the claim of aliens such as Rabinovitch for back scholarship funds by asserting the ban of the Eleventh Amendment in a case dealing with a subject over which they have lacked sovereign power for 186 years. Such a result would pervert the purpose and intention of the Eleventh Amendment.

B. Congress has enacted a comprehensive plan for the regulation of immigration and naturalization and has specifically legislated as to the legal status of aliens vis-a-vis the laws of the several states. By the provisions of 42 U.S.C. § 1981 Congress has granted to aliens the full and equal benefit of all laws:

> "All persons within the jurisdiction of the United States shall have the same right in every State and Territory . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens."

This statute applies to aliens as well as citizens. *Takahashi* v. *Fish & Game Commission, supra,* 334 U.S. at 419 n. 7; *Graham* v. *Richardson, supra,* 403 U.S. at 377; *Guerra* v. *Manchester Terminal Corporation,* 498 F.2d 641, 654 (5th Cir. 1974). Accordingly, this Court has held that "aliens lawfully within this country have a right to enter and abide in any State in the Union 'on an equality of legal privileges with all citizens, under non-discriminatory laws.' *Takahashi,* 334 U.S. at 420." *Graham* v. *Richardson, supra,* 403 U.S. at 378.

When Congress enacted Section 1981 pursuant to its plenary power to regulate the status of aliens and in order to specifically protect Fourteenth Amendment rights, *see Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409, 436 (1968), it necessarily implied a remedy for violations thereof. Plainly compensatory damages is such a remedy. *See* 28 U.S.C. §§ 1343(3) and (4). While the foregoing jurisdictional provisions do not themselves create a damage remedy, they indicate that Congress anticipated such awards would be made under the civil rights acts generally. Further, courts have "the power to afford all remedies necessary to the vindication of federal substantive rights defined in statutory and constitutional provisions except where Congress has explicitly indicated that such remedy is not available." *Brewer* v. *Hoxie School District No. 46,* 238 F.2d 91, 98 (8th Cir. 1956); *Bell* v. *Hood,* 327 U.S. 678, 684 (1945); *see also Texas & N.O.R. Co.* v. *Ry. Clerks,* 281 U.S. 548, 569-570 (1929). In essence, the existence of the statutory right implies the existence of all necessary remedies. *Texas & N.O.R. Co.* v. *Ry. Clerks, supra.*

In *Sullivan* v. *Little Hunting Park, Inc.,* 396 U.S. 229 (1969), in the context of a suit against a private defendant, the Court specifically considered the question of whether federal courts may award compensatory damages to redress a violation of Section 1982 (the companion provision to Section 1981). The Court held that damages were available in an action under Section 1982 because the "existence of a statutory right implies the existence of all necessary and appropriate remedies." *Id.* at 239.

As such, the Court should not limit any holding in favor of the enforcement of Fourteenth Amendment rights via suits for damages against the states to only those instances in which the statute enforcing Fourteenth Amendment rights specifically and definitely authorizes such an award. There can be no reasonable ground for authorizing such relief via back pay in Title VII cases, but withholding it in § 1981 actions to enforce the rights of aliens (or others).[9]

4. It is suggested in the opinion below, 519 F.2d at 570, and follows from the considerations underlying this Court's opinions in *Ex parte Young, supra*, and *Griffin* v. *School Board of Prince Edward County*, 377 U.S. 218 (1964), that while suits against a state for money judgments should not be permitted when other adequate remedies exist, if no such other relief will adequately remedy the wrong done and such a choice cannot be avoided, vindication of the rights created by the Reconstruction Amendments must be given priority over the policies underlying the Eleventh Amendment and sovereign immunity. Such a case is very different from commonplace suits asserting essentially state law claims against the state, *Parden* v. *Terminal R.R. of Alabama Docks Dept.*, 377 U.S. 184, 187 n. 3 (1964), or in which the federal question does not involve the vindication of constitutionally protected rights. *See Employees* v. *Department of Public Health and Welfare*, 411 U.S. 279 (1973).

In deciding the instant case, the Court should bear in mind that often there are no adequate alternatives to the private damage claim under the Fourteenth Amendment

[9] Moreover, even in a case seeking to vindicate the right to equal protection of the laws under the Fourteenth Amendment (without reference to any particular statutory enforcement provision), it is submitted that there should be available the damage remedy. *See Bell* v. *Hood, supra; Bivens* v. *Six Unknown Narcotics Agents*, 403 U.S. 388 (1971).

and federal enforcement statutes. There is absolutely no way to make petitioners herein whole save by the award of a money judgment. Indeed, absent the deterrent effect that the availability of such relief is likely to have, the states will be absolutely encouraged to ignore Fourteenth Amendment proscriptions until forced to honor them pursuant to prospective injunctions which will exact no penalty for past violations of equal protection. The actual victims of discrimination will, under such a system of law, remain the losers even though they win the litigation.

The right of Alan Rabinovitch to an equal opportunity to receive educational assistance funds (from state revenues to which he and his family regularly contribute by the payment of taxes) can only be vindicated in federal court in a private suit.[10] The only way in which a court can fully vindicate and rectify the wrong done him and alleviate the improper burdens imposed upon him over the years is to grant both injunctive relief and a monetary award. While Rabinovitch has been fortunate enough to be able to attend a free city university, other victims in other circumstances may not be so lucky. Good fortune is no substitute for a clearly defined and fully adequate remedy at law.

Conclusion

For the foregoing reasons and those advanced by petitioners, it is submitted that the Second Circuit's holding that the Eleventh Amendment bars the monetary relief sought by petitioners be reversed. It is further submitted that in deciding the instant case, the Court not foreclose

[10] An action to enforce the federal rights at issue in the *Rabinovitch* case probably does not lie in the New York State courts. *Maloney* v. *New York*, 3 N.Y.2d 356, 361, 165 N.Y.S.2d 465, 144 N.E.2d 364 (1957); *Percy* v. *Brennan*, 384 F. Supp. 800, 809 (S.D.N.Y. 1974).

the independent and distinct claims currently being litigated by Alan Rabinovitch before the United States District Court for the Eastern District of New York.

January 29, 1976.

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